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No 42-52-54 & 55

114-663

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.—NOS. 42, 54, 55, 52.

CALVIN AMORY STEVENS AND OTHERS

vs.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY AND OTHERS.

THE SAME

vs.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY AND OTHERS.

(***Three Cases.***)

BRIEF AND ARGUMENT FOR APPELLEES.

CHS. F. SOUTHMAYD,

Of Counsel for Appellees.

Supreme Court of the United States.

CALVIN AMORY STEVENS, EUGENE KELLY, John T. Terry and Peter Geddes, on behalf of themselves and other holders of Internal Improvement Bonds of the State of Tennessee, issued to The Memphis and Charleston Railroad Company,

VS.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY ET AL.

No. 42.

CALVIN AMORY STEVENS, EUGENE KELLY, John T. Terry and Peter Geddes, on behalf of themselves and other holders of Internal Improvement Bonds of the State of Tennessee, issued to The East Tennessee and Georgia Railroad Company,

VS.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY ET AL.

No. 54.

CALVIN AMORY STEVENS, EUGENE KELLY, John T. Terry and Peter Geddes, on behalf of themselves and other holders of Internal Improvement Bonds of the State of Tennessee, issued to The East Tennessee and Virginia Railroad Company,

VS.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.

No. 55.

CALVIN AMORY STEVENS AND John T. Terry, on behalf of themselves and other holders of Internal Improvement Bonds of the State of Tennessee, issued to The Cincinnati, Cumberland Gap and Charleston Railroad Company,

VS.

THE CINCINNATI, CUMBERLAND GAP AND CHARLESTON RAIROAD COMPANY, and The East Tennessee, Virginia and Georgia Railroad Company.

No. 52.

BRIEF FOR APPELLEES.

There is some difference in the circumstances of these cases.

All of the companies against whose roads the complain-

ants now set up their claims, received from the State of Tennessee at various times and in parcels, loans of the State's bonds, under the Act of February 11, 1852, commonly called the Internal Improvement Act, and under the subsequent amendatory and supplementary acts, but there was a difference in the manner in which settlements were made with the State for the indebtedness to it created by the loan of the bonds, and the State's statutory lien released or extinguished, or transferred.

In the case of The Memphis and Charleston Railroad Company, its indebtedness to the State for the borrowed bonds, was settled on July 25, 1877, by the surrender and delivery to the State by A. Iselin & Co. with the Railroad Company's assent, of bonds and coupons of the State to the amount of $1,736,906.25, which was the amount of the principal and interest at that time, and the transfer thereupon of the State's debt and the mortgage lien securing it to A. Iselin & Co., under and in pursuance of the sixth and seventh sections of the Act of February 29, 1869, and subsequently, under a special tri-partite agreement between Iselin & Co., the Railroad Company, and certain trustees, such debt and mortgage lien were assigned by Iselin & Co. to the trustees in trust to secure certain substitution bonds issued by the Railroad Company.

The two companies, The East Tennessee and Virginia Railroad Company and the East Tennessee and Georgia Railroad Company, after each had received loans of the State bonds, and thereby subjected its road to the statutory mortgage lien for the indebtedness to the State created by such loans, were consolidated together under the name of The East Tennessee, Virginia and Georgia Railroad Company, and in June, 1870, the consolidated Company made full settlement with and satisfaction to the State, in pursuance of the Acts of February 25, 1869, and January 2, 1870, for the indebtedness of both the original companies for the bonds borrowed, then amounting in the aggregate, including interest, to $4,117,761.10, by surrendering and delivering State bonds and coupons to that amount, viz.: $3,835,000 State bonds, $282,750 past due coupons, and $11.10 cash,

and received from the Comptroller of the State a certificate of such satisfaction and discharge of the indebtedness; the funds by which the State bonds used for this settlement were procured, having been raised by the issue of substitution bonds of the Railroad Company, secured by its mortgage to trustees, dated June 1, 1870, the substitution bonds being issued in pursuance of the second section of the Act of February 25, 1869.

The Cincinnati, Cumberland Gap and Charleston Railroad was a most unfortunate enterprise, and the road proved to be of little value.

The Company became totally insolvent, and under proceedings in Chancery taken by the State for enforcement of its lien, it was sold at auction in 1871, to R. T. Wilson and Charles M. McGhee for $300,000, payable in Tennessee State bonds. The purchasers, afterwards conveyed it for the same consideration to its present owners, The East Tennessee, Virginia and Georgia Railroad Company, the purchase of Wilson and McGhee having been, in fact, made as agents for that Company.

The cases brought against The East Tennessee, Virginia and Georgia Railroad Company upon the bonds issued to the Companies consolidated into it being the more important cases in amount, the references in this brief to the record will, except where otherwise expressly stated, be to the record in the first of those cases printed, volumes 1 and 2, as No. 641 (October Term, 1882), and volume 3, as No. 359 (October Term, 1883), present number of that case being No. 54.

Preliminary Statement of General Facts, and Appellees' General View of the Case.

The obligations held by the complainants are purely and simply the bonds of the State of Tennessee, payable to the bearer in the customary form of such instruments, obligat-

ing the State for the payment of the specified amount of principal and interest, and pledging for such payment its faith and credit. The Railroad Company which is now sought to be made liable, was neither endorser nor guarantor, nor did it enter into any contract whatever with the bondholder. Its name does not appear in or about, or in connection with the bond, and there was nothing to indicate to the purchaser or taker of the bond that the Railroad Company had ever had anything whatever to do with it, nor can it possibly be pretended that, as matter of fact, the bonds were ever negotiated or dealt in under any representation or understanding that the Railroad Company or its property was in any way bound to the bondholder. On the contrary, it is indisputable that the bonds were always sold, bought and dealt in, as Tennessee State bonds pure and simple, the bondholder knowing no one else than the State in the transaction.

The sole basis upon which the claim is undertaken to be supported is, that by the terms and conditions of the statutory mortgage *given to the State* by the Railroad Company to which it origiually loaned the bonds in aid of the construction of the road, (according to the construction of such terms and conditions asserted by the complainants, but which we hold to be utterly erroneous), the Railroad Company undertook (and as security for such undertaking bound its property by the mortgage) that it would pay directly to the State's bondholders the principal and interest specified in the bonds, and thus exonerate the State from, and indemnify it against, the obligation which, as between it and the bondholders, and according to the terms of the bonds, it alone assumed.

We conceive that it is conclusively settled by the decision of this Court in the case of *Chamberlain* v. *The St. Paul and Sioux City Railroad Company et. al.*, 92 *U. S. R., p.* 299, that *even if the complainants could succeed in establishing the correctness of the construction which they claim to give* to the terms and conditions of the statutory mortgage, it would not at all avail, to give to them any right of recovery here; for that the right to lay hold of the security afforded by the mortgage, which under such circumstances might

exist in favor of the creditor, if the mortgage had been given to an individual—inasmuch as it could not have been enforced against the State while it held the mortgage, because of the State's sovereignty and non-suable character, could not be enforced against the State's transferee of the mortgaged property—because a right of such character is, as the Court in that case declare, a right "resting in equity only," and not a contract right of the creditor, and therefore does not attach to and follow the property in the hands of the State's transferee.

The proposition above set forth will be fully discussed hereafter. We deem it fitting to mention it here, by way of *protestando* as it were, before entering upon the discussion of the disputed questions as to the true terms and conditions and legal effect of the statutory mortgage.

The position assumed by the complainants, and which, as we understand, they admit they must establish in order to give them any standing or possibility of success, is, that by the terms and conditions of the Internal Improvement Act of February 11, 1852, *i. e.*, the statutory mortgage, the Railroad Company undertook and agreed (and mortgaged its property to secure the fulfillment of such undertaking) that it would pay *direclty to the holders of the State bonds* loaned to it under the act, the principal and interest specified in such bonds, and for which, *according to their tenor*, the *State alone was obligated* to the bondholders; and that thus, according to the bargain, the Railroad Company was to take the entire charge and burthen of paying the interest and principal of the State bonds as its own proper debt, *precisely as if it, and not the State, were the obligor in the bonds.* Assuming this to be the bargain, and *that it should be fulfilled by the Company*, the State, after once issuing the bonds, would not be required to do anything further in regard to them, in respect of either principal or interest. Its position would be substantially like that of the endorser of a promissory note, who, after once endorsing it, never does anything about it or hears from it again, unless in the event of the maker allowing it to go to protest.

On the other hand, we say, that no such undertaking or bargain, nor anything like it, was made or prescribed by the Internal Improvement Act or statutory mortgage, and the contrary is clearly evident upon any careful and intelligent examination of its provisions, and that no such idea in relation to the relations or obligations of the respective parties as the complainants now assert, was entertained or even imagined by any of the parties concerned, either the State, the Railroad Company, or the State bondholders, but the practical construction and action of all of them, during the entire period, commencing with the first issue of bonds under the act and thence continuing for about a quarter of a century, proceeded upon an entirely different basis.

The loan of the State bonds to the Railroad Company was in substance and effect equivalent to the loan of so much money, the bonds being securities payable to bearer, negotiable by mere delivery, without leaving any trace of the parties through whose hands they may have passed, and readily convertible into cash at will without any other security for their payment than the pledged faith of the State, and at the time of the passage of the Act of February 11, 1852, the market price of such bonds was above par.

The Act of 1852 plainly treats the loan of the State bonds as *a transaction creating an indebtedness from the Company to the State, for the amount of the bonds thus loaned*, just as if, instead of the State's lending the bonds to the Company, leaving the Company to convert them into money, the State had sold the bonds itself, and loaned to the Company the money thus obtained.

It was quite immaterial, for the purpose of fixing and determining the relations and obligations of the respective parties, which of those two methods of borrowing the money by the State should be adopted.

And in either event, as the loan was made not by way of a speculation of or for gain to the State, but as an aid to the Railroad Companies, granted by the State because of the interest of its citizens in their works of internal improvement, the general plan and purpose with which the State engaged

in the operation required, that the provisions for reimbursement of the State for its loans thus made on its bonds should be so adjusted as that there should be neither gain or loss to the State in the transaction; and this made it necessary that the reimbursement, in its details, should have substantial correspondence with the requirements for fulfillment by the State of its own obligations to its bondholders. Plainly it was for these reasons, that the provisions for reimbursement or repayment of the loan made by the State to the Companies were in a shape somewhat more complex than they would have been, if the State loans had been made from cash funds belonging to it, which had not been obtained by borrowing.

In coincidence with the foregoing exposition of the general scheme of the act, we find, upon examination in detail of its operative clauses, which constitute the conditions of the statutory mortgage, that they do *not* require that the Railroad Company shall pay the interest from time to time accruing on the State bonds to the holders of the bonds or their coupons, or to any one at the maturity of the coupons, or at any time, or at the City of New York, where the interest on the bonds was made payable; but, on the contrary, require that the Gompany shall pay to the State, in Tennessee, fifteen days before such interest becomes due from it in New York, to its bondholders, an amount equivalent to such interest, together with the exchange and commissions which the State will be obliged to incur in remitting the funds and paying the interest in New York, through a bank or banker there.

And the provision for reimbursement to the State of the amount of the *principal* of the borrowed bonds, is *not* that payment of such amount shall be made to the holders of the bonds, or at the time when such bonds shall mature, but, on the contrary, such reimbursement is required to be made in successive annual payments to the State, not in money, but *in Tennessee State bonds of any kind*, which the State is to receive and credit at par to the Railroad Company, on account of its indebtedness to the State for the borrowed bonds, which annual payments, commencing five years after the completion of the railroad, are so adjusted that their amount (together with the accumulations of

interest upon the State bonds thus received, which accumulations are likewise to be kept invested in Tennessee State bonds of any class, upon the principle of an accumulative sinking fund) will about or nearly discharge the Railroad Company's indebtedness to the State for the principal of the borrowed bonds, by the time when such bonds will mature (forty years from their date), so that at that time, it will be for the State to pay off its bonds as its own proper debt, without any claim of recourse against the Railroad Company. And if, at such time of maturity, there shall be any remaining balance of the principal of the Company's indebtedness to the State, not discharged by such annual payments with their accumulations, the Railroad Company is required then to pay such balance; and in case of its failure so to do, a remedy is given to the State, for its collection by foreclosure of the mortgage and sale of the mortgaged premises.

Upon adverting to the practical construction and course of action in respect of the matter in question, of all the parties concerned, from the time of the first issue of State bonds under the Act of 1852, until the time of, or just before the commencement of, these suits in 1879, during which time the issues of State bonds under the act in question, and the amendatory and supplementary acts, amounted to an aggregate of more than thirty million dollars, we find it to be in entire accordance with our view of the obligations and rights and relations of the parties respectively, as above expressed, and in complete hostility to the views now asserted by the complainants.

It is indisputable that during that entire period of about twenty-five years, all the payments which were made by the Railroad Companies, as for amounts of interest upon the State bonds borrowed by them, were made to the State, and as payments of so much indebtedness from them to the State, and all the payments of interest made upon the State bonds, were made to the bondholders by the State and not by the Railroad Companies, and no Railroad Company ever paid to the holder of any of the State bonds or their coupons a dollar of the interest, or was ever called upon or requested so to do.

Upon thus ascertaining the true nature and effect, conditions and provisions of the statutory mortgage in question, the foundation of the claim asserted by the complainants entirely disappears. We find that the mortgage security which they seek to lay hold of, was given to secure *not* the payment of *their debt*, but the payment of *another* and *wholly different debt* to another party, in respect of which they are *neither parties, nor in anywise in privity*, and upon which, or the securities held or given for it, they have no pretence of lien or claim, either legal or equitable.

The complainants claim, if we understand it and the arguments in its support, is advanced and undertaken to be supported, *purely and solely upon the theory*, that the statutory mortgage given by the Railroad Company to the State is conditioned for the payment by the Railroad Company directly to them, of the State bonds which they hold; if, instead of being so conditioned it is in fact conditioned, as we insist, merely for the payment to the State of an indebtedness from the Railroad Company to the State, for the amount or value of the State bonds loaned by the State to the Company, treating such bonds as if they were so much money or other valuable thing loaned, we do not understand the complainants to claim that it is possible for them to succeed: and if they should nevertheless insist upon such a claim, we do not suppose that argument would be necessary to exhibit its utter groundlessness.

The rules of law applicable under such a state of facts, are so clearly and forcibly stated in the written opinion of the late Mr. Charles O'Conor, who was the senior counsel of the complainants (to which opinion they have given so wide circulation and upon the soundness of which in other respects they so tenaciously insist), that we can do no better here than quote from that opinion as follows:

"A bank or a government whose paper issues are nego-
"tiable by mere delivery, and circulate freely, may un-
"doubtedly make a direct loan of such issues, treating them
"as money. In such a transaction the lender's issues are
"not ear-marked to indicate their connection with the loan,
"*nor is any duty imposed upon the borrower in respect to the bor-*

" *rowed paper. He simply puts the lender's issues in use, as he* " *would use so much coin, and by that very act he withdraws* " *himself at once from any connection with them or any agency* " *in their subsequent career or destiny,* The transaction is im- " pressed with no other characteristics than such as belong " to a loan—pure and simple—made in current coin. The " media of accommodation thus lent as money, flow un- " marked through the hands of the borrower, and of all " subsequent temporary holders. Like the countless " globules which at any moment constitute the Hudson or " the Mississippi, they leave, in the channels through which " they have moved, no trace whatever of their passage. " *No entangling alliances with the original loan or its conditions* " *accompany such issues in any of their transits. The simple* " *relation of debtor and creditor, and no other, exists between* " *the lender and the borrower; that same relation, and no other,* " *exist between the maker of the issues and the holder who re-* " *ceives them from the borrower. Transactions of this precise kind* " *are frequent, nay, numberless; indeed, they are, of all loans,* " *the most common kind. No one ever contended that the holder* " *of paper thus issued could have any specific or other lien upon* " *the security which the lender may have taken for his reim-* " *bursement. Such a notion would be so preposterously repugnant* " *to common sense, that imagination has never yet conceived it.* " *Every bank discount exhibits just such a transaction, and* " *governments have made similar loans. For a specimen of the* " *latter see Act of July* 1, 1862, *incorporating the Union Pacific* " *Railroad Co.*, U. S. Statutes at Large, vol. 12, p. 492, §§ 5 " and 6."

We trust to satisfy the Court, that the Tennessee State bonds loaned to the Railroad Companies, which are in question here, come precisely within the class here referred to by Mr. O'Conor, in relation to which he says that "*no duty* " *is imposed upon the borrower in respect to the borrowed paper.* " He simply puts the lender's issues in use as he would use " so much coin, and by that very act he withdraws himself " at once from any connection with them or any agency in " their subsequent career or destiny. * * * * " *No entangling alliances with the original loan or its conditions*

" *accompany such issues in any of their transits; the simple re-*
" *lation of debtor and creditor, and no other, exist between the*
" *lender and the borrower; that same relation, and no other,*
" *exist between the maker of the issues and the holder who re-*
" *ceives them from the borrower.* * * * *No one*
" *ever contended* that the *holder* of paper thus issued *could*
" *have any specific or other lien* upon the *security which the*
" *lender may have taken for his reimbursement,*"—and Mr. O'Conor proceeds to say that such a notion would be "pre-
" posterously repugnant to common sense."

Mr. O'Conor cites the case of the loan of United States bonds made to the Pacific Railroad Company under the Act of July 1, 1862, as one in which it would be preposterous to claim that the holder of the bonds could have any lien or claim upon the mortgage security given by the Railroad Company to the Government, and yet we think that upon examining and comparing together the provisions of that United States statute and those of the Tennessee statute which is here in question, it will be found that there is no better basis for a claim on the bondholders' behalf, of a lien upon or interest in the Railroad Company's mortgage, in the latter case than in the former.

And we take it to be entirely clear and unquestionable, that if all the difficulties which exist against the complainants under the decision of this Court in the case of Chamberlain *v.* St. Paul and Sioux City Railroad, because of the security in question having been given to a sovereign State, were entirely removed, and the complainants case were to be considered as if the security they are seeking to lay hold of, had been given to individuals or a private corporation, the complainants could have no possible rights as creditors upon such bonds as they own, to lay hold, by proceedings in equity, of a security such as this is, given by a former borrower of such bonds, to the obligor from whom they were borrowed, to secure an indebtedness created by the borrowing.

The principle of equity law, under which are sustained claims of this general character, for the laying hold by a

creditor of securities given to one party standing as between himself and another in the situation of surety for a debt, by such other party primarily both for it, as between the two—either to secure the payment of such debt, or by way of indemnity against it—can have no possible application, except in favor of the creditor who holds the very debt to secure the payment of which, or for indemnity against which the collateral security in qnestion has been given.

We do not dispute that where the two parties *are separately bound to the creditor* and the relation of principal and surety in fact exists as between them, though not apparent upon the face of the obligations, *e. g.*, in the case of an accommodation note made aud issued merely for the benefit of the payee who has negotiated it with his endorsement, a Court of Equity will regard the substance of the transaction apart from the mere form, and upon finding that the nominal principal is really the surety, and the nominal surety is really the principal, it will administer equity between the parties and afford relief to the creditor accordingly; but, in saying this, we by no means concede that the rule of equity law, allowing the creditor to lay hold of the security, applies in any other case than one, in which the party giving and the party receiving the security *are both under a duty and liability to the creditor to pay to him the debt which he holds;* in which case a Court of Equity allows a creditor to lay hold of the security given by one of the two parties, both of whom are bound to him, to the other of such parties, and compels its application to the purpose, resulting to his benefit, for which it was given. And we insist that at all events, the rule which has been laid down in some of the authorities and denied in others, which forbids the release of such a security after it is once given, without the consent of the creditor, can have no application except in cases in which both the party giving the security and the party receiving it are both bound to the creditor.

Where the collateral security which is sought to be laid hold of by the creditor, under the principle of equity law above referred to, is not one which has been given to secure

the principal's payment of or the surety's indemnity against the debt held by the creditor, but has been given to secure the payment of a *distinct and independent debt or obligation not held by the creditor who seeks to lay hold of the security*, such creditor has nothing to do with, and can assert no right or equity in respect of such collateral security: and it makes no difference in this respect that the distinct, and independent debt, for securing which the collateral security was given, may have had its origin in connection with, or because of the creation of, the debt held by the creditor, and would not have existed if such indebtedness held by the creditor had not been created.

An instance of the application of the distinction above adverted to may be found in the familiar cases of accommodation or borrowed notes, and of exchange notes or acceptances, or what are sometimes called cross-notes or acceptances.

If A borrows for his accommodation B's negotiable promissory note or acceptance, with his express promise to B to indemnity him against it, or take it up at maturity, or under the implied promise to the like effect, which the law raises in such case from the mere fact of borrowing, *in the absence of any express agreement as to to indemnity or reimbursement*, and A negotiates with his endorsement the note thus borrowed, the law, upon ascertaining the facts, pronounces that although B appears upon the face of the contract as principal, he in legal effect is surety, and that A, though in form appearing to be surety, is in legal effect principal, and the respective rights of A and B and of the creditor, are adjudicated upon that basis; so that if A has given a collateral security to B for the borrowed note, the holder of the note may unquestionably lay hold of such security by proceeding in equity.

And in States where there prevails an usury law, making void loans upon which there is reserved more than the legal rate of interest, if, upon the first negotiation or issue of such borrowed note by the borrower, there is reserved more than the legal rate of interest, the note is absolutely void.

But in the case of cross-notes or acceptances, *i. e.*, where a party desiring to raise money, instead of simply borrow-

ing a note, under his express or implied promise to pay it to the holder or indemnify the maker against it, receives from the party whose aid he seeks such party's negotiable note or acceptance, and gives to such party his own cross-note or acceptance of like amount, maturing either at the the same time with, or a different time from, the note he receives, the respective rights and relations of the parties are entirely different.

The law pronounces, in such case, that the one note is a full consideration for the other; that each party is bound to pay his own note as his own proper debt, and that the *relation of principal and surety does not exist at all between the parties to the transaction* (except, of course, that if a party who has received a note upon such exchange, negotiates it with his own endorsement, he thereby assumes the like relation of *quasi* suretyship for the maker of the note, as is assumed by the endorser and negotiator of an ordinary promissory note, which has been received for full value, *e. g.*, for the price of merchandise sold).

And as the natural and inevitable result of this adjudication, it has long been settled law, that where the usury law prevails, an exchange or cross-note, of such character as above referred to, may lawfully be negotiated by the party who received it in the exchange, with the reservation of any rate of interest or discount which may be agreed upon, wholly unfettered by the usury law; that such exchange note stands upon precisely like footing with a note given for goods sold or for other full value.

Rice *v.* Mather, 3 Wend., 62.
Dowe *v.* Schutt, 2 Denio, 621.
Cobb *v.* Titus, 10 N. Y., 198.

So exchange or cross-notes are provable in bankruptcy as debts of the maker of them in favor of the receiver of them or his estate, precisely like other debts founded upon full consideration.

Rolfe *v.* Caslon, 2 H. Blacks, 570.
Buckler *v.* Bullwant, 3 East., 72.
Cowley *v.* Dunlop, 7 T. R., 565.
Bayley on Bills, 1st Am. Ed., 298.
Chitty on Bills, 12 Am. Ed., 791.

A further inevitable consequence of the principle in relation to the effect of exchange or cross-notes above referred to is, that the party receiving a note in the transaction, being bound to pay the cross-note which he gives in the exchange, *is not under any implied or other obligation to take up or pay the amount of the other note which he received* in the exchange, when, after he has negotiated it, it falls due, as he would be if it were a *borrowed* note.

Wooster *v.* Jenkins, 3 Denio, 187, was a case of exchange notes, in which both parties to the exchange negotiated, with their own endorsement, the notes they had respectively received, and both fell into pecuniary difficulties and both notes went to protest, and for a long time remained unpaid.

Subsequently one of the parties, having recuperated his affairs, paid and took up from the holder the note which he had given to the other party upon the exchange, and thereupon brought an action against the party who had received and negotiated that note, to recover the amount thus paid as so much paid to his use, treating it as if a lent note, and endeavoring by this means to avoid the effect of the Statute of Limitations, which had barred an action upon the cross-note which he had received in exchange.

The Supreme Court of New York, upon the application of previously well-settled principles, held that the action could not be maintained; that the *express promise* to pay contained in the cross-note *prevented the arising of any implied promise* to take up or indemnify against the note received in the exchange; that the remedy was on the cross-note, and on that only, and the fact that such remedy was barred by the Statute of Limitations could not raise a cause of action on the basis of a supposed implied promise to pay or indemnify against the other note.

It is manifest that the principle thus established and applied in the case of cross-notes or acceptances, is *equally applicable in all cases where* the party, receiving for his accommodation the note, bond or other negotiable obligation of another, to the end that he may by negotiating it, raise funds for his own use—*instead of* making an express promise to pay such note, bond or other obligation to the holder of

it, or to indemnify the maker of it against its payment, or leaving his obligation in respect of the transaction to rest upon the implied promise of payment, or reimbursement, or indemnity, which the law raises *in the absence of any express agreement on the subject*—enters into an agreement, in whatever form or shape, with the party from whom he receives the note, bond or other obligation, to the effect that he will make payment or satisfaction of its amount to such *party from whom he received it* in advance of its maturity, so that, when the note, bond or other obligation becomes due to the creditor, it will be a debt or obligation which the *maker or obligor will be bound to pay as his own proper debt*, without recourse over against the party to whom it was originally lent.

In the case of insurance and reinsurance, we have an illustration of the principle that were a creditor has a claim against his debtor, and his debtor has an independent claim against a third person, to be indemnified against that liability, but *such indemnitor is not liable to the creditor*, the creditor has no recourse in equity against the indemnitor.

In the case of Herckenrath *vs.* American Mutual Insurance Company, 3 Barbour's Chancery Reports, 63, an insurance company had issued a policy to the complainants, and then had procured itself to be reinsured against its liability on that risk by another insurance Company. Of course, the obligation of the reinsurer was to indemnify the original insurer against its liability to the original assured in case of the occurrence of a loss.

The loss had happened; the original insurer had become insolvent and made an assignment to trustees for the benefit of its creditors, and the reinsurer was solvent. The original assured thereupon sought, by bill in equity, to lay hold of the claim of the original insurer against the reinsurer for the satisfaction of his loss.

The case was elaborately argued by counsel and carefully examined by the Court, and Chancellor WALLWORTH, in the conclusion of his opinion, thus announces the result;

"From the nature of the contract of reinsurance, *and the "want of privity between the reinsurer and the person first in-*

"*sured*, I think it *does not come within the rule* that the prin-"cipal creditor is in equity entitled to the benefit of all "counter bonds and collateral securities given by the prin-"cipal debtor to his sureties. The claim of the complain-"ants, therefore, cannot be sustained."

The principle thus settled in relation to the effect of insurance and reinsurance in case of the insolvency of the original insurer, has for more than thirty years been regarded in the State of New York as unquestionable law, and in the frequently recurring instances of insolvency of insurance companies has always been applied as the rule in the distribution of their assets.

But a still more striking and obvious, and perfectly incontrovertible case, of the application of the distinction we have been referring to, is presented, where a party desiring to raise money for his own accommodation, receives the note, bond or obligation of another, payable to bearer, or otherwise created in such form as that it is designed to be negotiated and passed from hand to hand merely as the obligation of the party issuing it, without endorsement, guaranty, or other obligation by or on the part of the party receiving and transferring it, and where the party thus receiving it enters into an arrangement or agreement, in whatever form, with the maker or obligor of the security issued in such form, to make direct payment or reimbursement to him for the amount of the obligation thus issued.

That is the precise nature of the case at bar, and that is the class of cases referred to in Mr. O'Conor's opinion, in which he says: That the notion that the holder of obligations thus issued, could have any lien upon the security which the lender may have taken for his reimbursement, "would be so preposterously repugnant to common sense that imagination never yet conceived it."

We do not conceive it to be at all needful, under the actual circumstances of this case, that we should follow the lead of the plaintiffs' counsel, in their very elaborate citations of and criticisms upon authorities, bearing upon the various questions arising out of or connected with the general doctrine, under which a creditor is allowed, by proceedings in equity, to lay hold of a collateral security given by a princi-

pal to a surety for securing the payment of or indemnity against the debt held by the creditor. Where the doctrine is applicable, the authorities are conflicting upon the question whether, after such a security is once given, the party receiving it can or cannot, before the institution by the creditor of legal proceedings for laying hold of it, effectually release it without the creditor's assent; and in some instances very nice distinctions are undertaken to be drawn between the circumstances under which such a release can, and the circumstances under which it cannot, be effectually given, and we find in the plaintiffs' brief citations of a very great number of authorities in various States of the Union, bearing upon this question and the attempted distinctions, and then a very elaborate argumentative attempt of the plaintiffs' counsel to bring their case within the class of cases in which they claim the authority to be *against* the right or power of release without the creditor's assent.

We do not think that it would be proper for us to take up the time of the Court with any elaborate discussion or citatation of authorities in answer to this portion of the plaintiffs' brief, because—

1. The *general doctrine* has *no application whatever* to this case, inasmuch as the security in question was not given for or in respect of, or as indemnity against the debt held by the plaintiffs, but for securing an entirely different debt to another party.

2. The decision of this court in the Chamberlain case has settled that the doctrine could at all events have no application in this case, because of the security in question having been given to a sovereign State, non-suable.

And, therefore, we do not see how it can ever become material for the Court, in disposing of these cases, to enter upon examination or criticism of the great mass of authorities cited in the portion of the plaintiffs' brief which is above referred to.

We will, however, before taking leave of this branch of the plaintiffs' brief, make one or two suggestions in relation to it, and call attention to two or three well considered cases, in courts of good general authority, bearing upon the questions.

Among the cases relied upon by the plaintiffs are some two or three decided by the courts of the State of Tennessee, none of which appear to have been of any considerable importance, or to have been considered by the court with any particular care.

As to these cases, the remark is obvious, that they are entitled to no more weight with this Court, in the decision of this case, than if they were decisions of the courts of any other State. If the Court should find occasion (as we do not believe it can) to pass at all upon the questions raised by this portion of the plaintiffs' brief, it would not be passing upon or deciding any question of Tennessee law, local or statutory, but a question of *general equity law*, in which, as in cases of commercial law, it does not lay down one rule for application in one State, and another rule for application in another, but when called upon to decide, does so according to its own sense of what the law on the subject is, or ought to be, and makes a decision equally applicable in all the Federal Courts.

We suppose that this Court, in the case of Chamberlain *vs.* St. Paul and Sioux City Railroad Company, has completely settled the entire *non-applicability of the general doctrine* above referred to, in cases where the security has been given to a sovereign State.

But if the Court should hold that not to be so, and should, moreover, by any chance, so dispose of the other points contended for by us, as to find itself called upon to determine, as a question of general equity law, whether a security, after being once given by a principal to a surety, can be effectually released by the surety, without the creditor's assent, before the creditor has asserted legally his right to lay hold of it, it seems to us to be a very important consideration in favor of such right of release that the right of laying hold of such a security, which the law allows to a creditor, is *a right resting in equity*, and *not a right founded on contract*.

It is true, that in the giving of the security there is a contract made between the giver and receiver of it, but *to that contract* the creditor is *neither party nor privy;* usually he does not know of it at the time when the security is given,

and certainly he need not, it being indisputable law that, although he was entirely ignorant of it at the time, he may, upon subsequent discovery, file his bill for the enforcement of his equity in respect of it.

Therefore, in so far as respects the creditor, it is not at all a case of contract.

The right is allowed to him, not because it has ever been contracted that he shall have it, but because it is just and equitable that he shall have it. And it is allowed to him, not at all as a right founded upon contract, but merely *upon the equitable principle of subrogation*, or, as some of the cases put it, for the avoidance of *circuity of action*, and, such being its ground and reason, the creditor can only be subrogated to *the security, as it exists at the time he asserts, in a Court of Equity, his equitable right*. He cannot be subrogated to a thing which once was, but is no longer.

And, while the creditor has not come forward to assert such equity, and as yet there is nothing actually subsisting and in force or operation, but the contract between the giver and the receiver of the security, it is merely the application of the general principle, that the parties who make a contract can unmake it, to hold that the security may be surrendered to him who gave it.

And if the idea should be entertained (for which we submit there is no just foundation), where the giver of the security is, before or when he gives it, already bound to the creditor for the payment of the debt, that when he gives such a security it is so *in aid of*, and *as between him and the creditor supported* by his subsisting obligation to the creditor, as to *make the creditor in effect a party* to its being given, and make it inequitable for the debtor to withdraw from his creditor such additional security after it is once given; there can be no basis for such a ruling in such a case as this is, where the party giving the security (the Railroad Company) was not at all liable to the creditor, holder of the State bonds, either upon the face of the bonds or by endorsement or guaranty, or in any shape or form whatsoever.

Moreover, as the right in question is not a contract right, but one resting in equity only, it cannot be asserted or enforced otherwise than in accordance with *the equity law of the State or country where enforcement of it* is sought, *as such equity law exists at the time when the creditor comes forward to enforce it.*

If we are to consider this case as if all the parties interested in, or claiming interests in respect of, the transaction, had been individuals and private corporations, all subject to the processes of the law, the *creditor's privilege*, of availing himself by suit in equity of this special remedy for collection of his debt, *extra*, his contract and the ordinary remedy against his debtor for its enforcement, is *not at all a vested right.* It is merely one of the legal remedies afforded to him by the law at the time being, and as completely subject as other special remedies (*e. g.*, one by *garnishment* of the debtor's effects in the hands of a third person) to regulation, control, or withdrawal by the law-making power, at any time before it is actually exercised.

Therefore, even though it should be held, that under the general principles of equity law, it was not competent for the State of Tennessee *in its mere character of receiver of the security, and treating it as if it were a private corporation,* to take such action in respect of the security as would defeat the creditor's special remedy against or in respect of the security to which the equity law entitled him, it was dearly competent for the State of Tennessee, *in its sovereign capacity of law-maker,* to control, deal with, or abrogate that special remedy, *just as it ight have done if the transaction had been entirely between other parties;* and it is clear enough that under the statute laws of Tennessee as existing at the time of the commencement of this suit, the complain ants' right to any such special remedy in equity in aid of the collection of their debts, if it ever existed, had been taken away by statute.

If by legal statute it had been extinguished, so as to be not claimable in the Chancery Courts of the State of Tennessee, of course the creditor could have no better right to claim it in the Federal Courts sitting in that State.

The authorities to which, as above stated, we propose to refer the Court, in relation to this portion of the plaintiffs' brief above referred to, are as follows:

The origin of the doctrine is the case of Maure *v.* Harrison, reported in, Equity Cases, Abridged, 93, Michaelmas Term, 1692, which is reported in six lines, as follows: "A "bond creditor shall, in this Court, have the benefit of all "counter bonds or collateral security given by the principal "to the surety; as, if A owes B money, *and he and C are* "*bound for it*, and A gives C a mortgage or bond to indem- "nify him, B shall have the benefit of it to recover his "debt."

In the case of Hopewell *v.* Cumberland Bank, 10 Leigh, 206, will be found an elaborate consideration, by the old Court of Appeals of Virginia, a Court of most respectable authority, of this doctrine, and of the principles upon which it is founded. On page 221, Parker, Justice, says: "There "can be no question of the right of a creditor to be substi- "tuted to any counter bonds or other securities given by "the principal debtor to those bound with him as his sure- "ties. The only case I have met with directly deciding "that principle is Maure *v.* Harrison. The same principle, "however, is asserted in several other cases as one per- "fectly well established, and is regarded by the elementary "writers as not at all questionable."

"The case of Wright *v.* Morley, 11 Vesey, 12–22, was "one of a surety seeking to avail himself of a specific fund "assigned by the principal debtor for the payment of an "annuity, and Sir William Grant said: 'That, as the credi- "tor is entitled to the benefit of all the securities the princi- "pal debtor has given to his sureties, the surety has full as "good an equity to the benefit of all the securities the prin- "cipal gives to the creditor.' Thus reasoning from the first "proposition as a postulate requiring no support from au- "thority."

"Nor has the doctrine been denied in the argument of "the case at bar. It is conceded, that, if a surety is *bound* "for the debt and is indemnified by the principal debtor,

" the creditor may pursue the indemnity in exoneration of " the liability of the surety. And this arises, *not from any* " *notion of mutual contract between the parties*, that in provid- " ing for the surety the creditor shall be equally provided " for, but from a principle of *natural equity independent of con-* " *tract*, namely: *that to prevent the surety from being first har-* " *rassed for the debt or liability, and then turning him round to* " *seek redress from the collateral security given by the principal,* " *a court of equity will authorize and even encourage the creditor* " *to claim, through the medium of the surety*, all the rights *he* " has thus acquired, to be exercised for his benefit and in " discharge of *his* obligation. The claim of the creditor, " therefore, is as much *founded on the well-known doctrine of* " *substitution*, as the claim of the surety to stand in the place " of the creditor who has received collateral security from " the debtor, *and, in my opinion, it stands upon no other foun-* " *dation.*"

* * * * * * *

" But, when the principal debtor conveys property to his " surety not specifically bound to the creditor, he has no " intention of giving any lien to the creditor, or to pledge " the property to him for the debt, and as he has a right to " dispose of his property as he pleases, provided he com- " mits no fraud, the Court will not consider the instrument " giving the lien beyond the extent, although it will, to " effect the exoneration of an innocent surety, permit the " substitution to the creditor's rights."

In this same case of Hopewell *v.* Cumberland Bank, 10 Leigh, 206, PARKER, Justice, further says:

" It is not necessary to notice particularly the numerous " cases illustrative of the *doctrine of subrogation*, since *all* " *of them are cases of rights and remedies actually existing*, and " the expressions sometimes used by the judges to explain " the right of a creditor or surety to resort to a lien, as that " it is the property of the principal debtor pledged for the " debt, must be taken in reference to the subject matter " under discussion, and to the facts appearing in the case. " Thus construed, there is nothing in the case McMahon

"*v.* Fawcett, or in any other referred to, which is inconsist-
" ent with this opinion. *No more is meant than that the*
" *property, pledged to either the creditor or the surety, though*
" *not to the person seeking to charge it, may be reached by sub-*
" *stitution in a Court of Equity*, without regard to the inten-
" tion of the contracting parties. But still, the party who
" seeks to be subrogated must show that the person to
" whom the property is pledged or any other counter
" security is given, *has or would have a right, in the contem-*
" *plation of a Court of Equity, to claim the benefit of the indem-*
" *nification by being liable for the debt or obligation, or entitled*
" *to charge the fund pledged, and that the plaintiff has a*
" *subsisting equity to enforce the lien or the counter security in*
" *the same manner as if there were an actual cession of the*
" *action.*"

In this case of Hopewell against Cumberland Bank, the maker of a note had given a trust deed in the nature of a mortgage to secure an endorser of it for his liability. By laches of the creditor in omitting to give proper notice of protest, the endorser had become discharged, and thereupon the holder of the note sought by the bill in equity to lay hold of the mortgage security which had been given by the maker to the endorser. But the Court of Appeals of Virginia held that, inasmuch as the personal liability of the endorser had terminated by the creditor's laches, the creditor had no right to resort to the mortgage security.

In the case of Homer *v.* Savings Bank, 7 Conn., 478, BISSELL, J., says:

" It also follows that no third person can claim the bene
" fit of this trust but through William C. Holly, *and, claim*
" *ing through him, must stand in his place and be subject to the*
" *same equity to which he would be subjected were he now*
" *claiming the execution of the trust.* What that equity is,
" the facts found in the case sufficiently disclose. It cannot
" be necessary to advert to them. It is sufficient to say,
" that equity would require him to pay to the Eagle Bank
" at least half a million dollars before the shadow of a claim
" would exist in his favor."

In this case of Homer against Savings Bank, the bank had given a mortgage or trust deed to secure the endorser of certain post notes. The holders of the post notes (the endorser being insolvent, and the bank also) sought to lay hold of the security; but, it appearing that there was *an independent claim existing in favor of the bank against the endorser* which would have disqualified, *as between him and the bank*, from claiming the benefit of the security, the Court held that this, *although arising upon an entirely independent transaction*, precluded the creditor from making claim upon the security.

We come now to the consideration and discussion in detail of the questions in dispute between the complainants and ourselves as to the true character, construction and legal effect of the statutory mortgage lien in question, as determined by the provisions of the Act of February 11, 1852, and the amendatory acts passed from time to time while the issue of bonds by way of loan to the Railroad Companies were being made, taken in connection with the other pertinent facts appearing in evidence.

The claim asserted by the complainants appears to be vested by them almost entirely—we believe we are entitled to say it it vested exclusively—upon certain brief expressions contained in the Act of February 21, 1852, viz.:

1. The words "constitute a lien," as used in the third section.
2. And the words "for the payment by said Company of said bonds, with the interest thereon as the same becomes due" as used in the third section, and the words "for the payment of said bonds and the accruing interest thereon" as used in the earlier part of the fourth section, and the words "for the payment of all of said bonds issued to the Company, as provided in this act, and for the interest accruing on said bonds," as subsequently used in the fourth section.

We think it a fair remark for us to make, and that it will be found to be borne out upon thorough examination, that

if the complainants, at any stage of the presentation of their case, are enabled to make even any apparent headway towards sustaining it, they can do so only by seizing hold of these brief phrases, and insisting upon the literal reading of them in the sense which they claim, notwithstanding such literal reading is in utter hostility to the general frame and manifest plan and purpose of the act, and *in disregard* of other elaborate provisions contained in it, which show beyond question that the real meaning of these phrases is entirely different from what the complainants insist upon; and, moreover, in respect of the first phrase, "constitute a lien," the complainants totally misread it, by *cutting in two the clause of which it forms part*, and then undertaking to *use the severed portion apart from the remaining portion which qualifies and changes it*, and they thus present a distorted and entirely unfair version of the expression.

FIRST.—TRUE SIGNIFICATION AND EFFECT OF THE WORDS "CONSTITUTE A LIEN," as used in the act.

A very great part of the case which the complainants' argument undertake to build up, is founded upon these words, "constitute a lien," which they constantly repeat, and undertake to give effect to in various forms and connections.

We find them sometimes insisting that the act in effect declares that the *bonds* themselves shall *be a lien*—sometimes —that by the act *the bonds are constituted a lien*—and, persistently and always, they insist that the act does, in its legal effect, and by force of the language which it uses, make *the bonds themselves a contract lien in favor of their holders* upon the property of the railroad company.

It is to be observed in the first place that if these words, "constitute a lien," had any such signification or important effect, as the complainants attribute to them, the complainants' case in this respect would be subject to this insurmountable objection, viz.:

The words, "constitute a lien," are found *only in the third section* of the act, and are not even *alluded to* or referred to

anywhere else, and, beyond possibility of dispute, the bonds to which the third section refers are those, and those only, which were issued "for the first section (*thirty miles long, see section one*), of the road," and the lien, which under this third section of the act is to be constituted, is not upon the railroad, but only "upon said section."

And *there is neither allegation nor proof, in any one of these cases, that any one of the bonds upon which the suit is founded was issued for, or in respect of, the first section of the railroad.*

Moreover, the lien upon the first section of the road, created under the third section of the act, was *temporary* in its operation.

The fourth section of the act provides for the creation of further and similar fragmentary liens, *in favor of the State of Tennessee*, upon subsequently constructed sections, of twenty miles each, of the road, for the bonds issued in respect of such subsequent sections respectively; but, in respect of these subsequent sections, there is no declaration that the bonds shall "constitute a lien," nor any words which could be construed as *importing into* the fourth section, from the third, these words, "constitute a lien," *if there were any ground* (as unquestionably there is not), for construing those words, when used in the third section, as *constituting the bonds themselves a lien*, in favor of the bondholder, in distinction from such mere liens in favor of the State of Tennessee, as alone are mentioned or provided for in the fourth section.

And, in virtue of a subsequent provision of the fourth section, when the road is completed, the State of Tennessee is to be vested with a single lien upon the entire road for the amount of all the bonds, whereby, clearly, all the previous fragmentary liens, upon portions of the road, in respect of portions of the bonds, are to be superseded and swept away.

Of course we would not have it understood that we have the slightest idea that there was, in virtue of the words "constitute a lien," as used in the third section, a lien created in favor of the holders of the bonds issued under that section, and that in respect of the bonds issued under the

fourth section, there was a different system, and no such lien.

But we find the complainant's undertaking to build up a great argument in their favor, upon the basis of the use of these words in the third section, and perceiving the foregoing complete answer to it, we feel bound to bring such answer forward.

We conceive it to be absolutely clear, taking the third section merely by itself, and with reference to the bonds issued under it, that there is no ground whatever for attributing any particular force or effect to those words, "constitute a lien" in the connection in which they are there used, and our reasons for taking this view will be shortly hereafter stated. But it seems proper here to say that it seems clear to us, from the circumstance that the words "constitute a lien" are *not* used or referred to with reference to any others of the bonds than those issued under the third section of the act, that they cannot have been inserted in the third section for the purpose of creating a lien in favor of the bondholders.

We will now proceed to examine, and consider in detail, the third section itself;

That section provides, "That *so soon as* the bonds of the State shall have been issued for the first section of the road as aforesaid, *they shall constitute a lien* upon said section so prepared as aforesaid, including * * * * * and the *State* of Tennessee, *upon the issuance* of said bonds, and by *virtue of the same*, shall be invested with *said lien or mortgage*, without a deed from the company, for the payment by said company of said bonds with the interest thereon as the same becomes due."

We shall hereafter discuss *separately and very fully* the questions presented by the *use of the words* "for the payment of said bonds with the interest thereon," in the description of the lien vested in the State of Tennessee, and by the words of similar import as used in the fourth section. Our *present subject* of discussion is, the *meaning and*

effect of the words, "they shall constitute a lien," in the connection in which they are used.

We must admit that there is here a slight *grammatical inaccuracy*, in the phraseology used, (a fault found in divers other parts of this act) but there is not a particle of room for doubt as to the meaning.

Taking *the whole section together*, as unquestionably it must be taken, the meaning and effect of it plainly is, that the *issuance* of the bonds, *i. e.*, their delivery to and acceptance by the company under the act, shall "constitute," *i. e.*, "create, establish, or give rise to "*a lien in favor of the State of Tennessee* upon the company's property as a lien *by way of mortgage without deed, for securing the making by the company of the payments in the section provided for.*

We quote from Worcester's, Johnson's, and Richardson's dictionaries the definition of the word "constitute," as follows:

WORCESTER. (*Con*, with, and *statuo*, to set up.)

Constitute.

1. *To build up, to establish, to institute.*

2. To form or compose as an element.

3. To appoint, depute or empower, as to constitute one an attorney.

JOHNSON.

Constitute.

1. *To give formal existence; to make anything what it is; to produce.*

2. *To erect; to establish.*

3. To depute; to appoint another to an office.

RICHARDSON.

Constitute.

To cause or make to be; to fix, settle, establish or confirm; to order, decree, appoint or determine.

Having reference to the proper and ordinary meaning of the word "constitute," as thus clearly ascertained, it is entirely plain that if the idea intended to be expressed had been, that the *bonds themselves* should be the lien, the proper expression would have been, that *the bonds upon their issuance, should be a lien*—or, if the person undertaking to express such an idea had an inveterate prejudice in favor of long words instead of short and simple ones, and therefore wished to use some such words as we find here, he should have said that the bonds upon, or by their issuance, should "be constituted" a lien.

It is to be noted that this lien, which the first clause of the third section declares *shall be constituted*, is by the *latter clause of the same section vested in the State of Tennessee as the holder of it.*

Indisputably, *the third section does not create two liens.* In the first clause it provides that *a lien shall be constituted*, and in its latter clause, that the *State of Tennessee, upon the issuance of such bonds*, and *by virtue of* the same (*i. e.*, the issue) *shall be invested with said lien or mortgage*, with or without a deed from the company.

In the case of the United States statute, providing for the loan of bonds to the Pacific Railroad Companies, the language used in the fifth section of the acts is that "*the issue of said bonds and delivery to the company*" shall, *ipso facto*, constitute a first mortgage on the whole line of the railroad-&c."

The *Missouri statute*, under which arose the question in Murdock *v.* Woodson, 2 Dillon, 206–7, affirmed in Woodson *v.* Murdock, 22 Wallace, 351, provides as follows (see pages 282–3 of complainants' brief):

Sec. 3. "No part of the said bonds shall be delivered to

the said companies, or either of them, until the acceptance thereof shall be signified to the Secretary of State by the filing in his office of *a certificate of such acceptance* under the corporate seal of the company thus accepting, and the signature of the president."

Sec. 4. "Each *certificate of acceptance* so executed and filed as aforesaid shall be recorded in the said office of Secretary of State, and *shall thereupon become and be*, according to all intents and purposes, *a mortgage of the road of the company* executing and filing their acceptance as aforesaid, and every part and section thereof and its appurtenances *to the people of this State*," *&c.*

In the three cases, of Tennessee, United States, and Missouri, the object is alike, viz., to create a mortgage upon the Railroad Company's property, to the Government loaning its bonds, under and in virtue of the statute, without the formality of a mortgage deed.

This is done in the United States statute by the declaration that "the issue of said bonds and delivery to the company shall, *ipso facto*, constitute a first mortgage."

In the Missouri case, it is done by the provision that the Company shall execute a *certificate of its acceptance of the loan of the bonds, which certificate* upon its being filed and recorded, shall *become and be a mortgage*.

In the Tennessee case, it is done in a more circuitous form. So far as respects the first section of thirty miles, it is provided, that so soon as the bonds for that section shall have been issued, they shall *constitute a lien* upon said section, and that the State of Tennessee, *upon the issuance* of said bonds and *by virtue of the same*, shall be *invested* with *said* lien or *mortgage*, without a deed from the Company.

(As respects the bonds for subsequently constructed sections of road, provided for in the fourth section of the act, the language is less circuitous, being merely that "upon the issuance of the said bonds, the *State of Tennessee shall be invested with a like mortgage or lien*, without a deed from said

Company "—without using the words "constitute a lien" at all—and so substantially, in relation to the final and complete lien in the State favor upon the entire road when it is finished. But we will not *in this place* insist upon these differences in language between the third and fourth sections, and as we are here discussing merely the effect of the words "constitute a lien," and consider it an easy and certain task to upset all the pretensions which the complainants found upon the use of those words, we propose here to discuss the question upon the third section, which is the complainants' reliance, just as if the language in that section which they rely upon had been likewise used in the succeeding section.)

And thus proceeding, we say, it is too plain for dispute that the words in the first part of the third section, that "as soon as the bonds shall have been issued, they shall constitute (*i. e.*, create or establish) a lien, when taken in connection with the subsequent language, that the *said* lien (the lien thus constituted or created) shall be *vested in the State* of Tennessee *upon and by virtue of the issuance* of the bonds, have precisely the same meaning and effect as if the words used in the first part of the section had been, that "as soon as the bonds shall have been issued, the issuance of the same shall constitute a lien," &c., leaving all the rest of the language of the section to stand as it is.

If there had been this very slight change in phraseology, the basis which forms the great staple of the complainants arguments would have had no existence, yet it is impossible for any one fairly to doubt that the real meaning and intent, in the one form of expression, was precisely what it would have been in the other.

It is indisputable that whatever lien was "constituted," was, and by the same action, *eo instanti*, vested in the State of Tennessee, and there can be no pretense that there was any "constitution" of the lien apart from the State's becoming "invested" with it, and such investing of the State with it is, in express terms, declared to be upon and *by virtue of the issuance* of the bonds. We say this, supposing that the complainants' counsel will not undertake to question, what

is quite evident, that when the words "upon the *issuance* of the bonds and by virtue of *the same*" are used in this part of the third section, the words "by virtue of *the same*," mean, by virtue of the issuance.

If they undertake to deny this, we need only, in answer, if any answer be deemed necessary, refer, for proof of the legislative intent, to the third section of the cotemporaneous Act of January 15, 1852, authorizing the loan of the State bonds in aid of building bridges on the line of the East Tennessee and Virginia Railroad, which the plaintiffs print in their brief at pages 11 and 12, because, as they state on page 11, its terms are almost identical with those of the General Internal Improvement Act of February 21, 1852; in which third section of the Act of January 15, it is provided that, so soon as the bonds are issued for the first section, the said bonds shall, *on issuance thereof*, constitute a lien * * * * "and the State shall be invested with such lien *on and by virtue of such issuance* of said bonds."

But not only is it plain that, in this section, the meaning of the Legislature was to declare that the "issuance" of the bonds should constitute or create the lien, but it is unquestionable that it was *that issuance alone, i. e.*, the delivery to and acceptance of the bonds by the Railroad Company, that gave to the Legislature the *power* to declare that the lien should be constituted.

The State has no power, merely *by making its own bonds*, to make them, or constitute them, liens on the property of the Company.

The power to "constitute" the lien in question (whatever was the nature of the lien), was derived solely from the Company's *voluntary act* of accepting delivery of the bonds on the terms prescribed by the act, which delivery and acceptance is in the act called the "issuance."

Doubtless, it *would have been competent* for the Legislature to enact that the delivery and acceptance of the bonds under the act, which in this section is termed the "issuance," *should make the bonds themselves a lien in* favor of their holders, just as they might, as a condition of granting the State aid, have imposed almost any other bur-

then which the Company might choose to accept as such condition, but if they had so done, still it would *necessarily* have been the *delivery and acceptance* or *issuance* of the bonds, and not the bonds themselves, that would have *created* or constituted the lien.

If it were the bond itself which is to be the lien, the lien would endure only during the life of the bond, as a subsisting obligation. The act declares that upon the delivery of the bonds by the State to the company, the lien shall arise *eo instanti*, but at that time the bonds are held by the company itself, so that, upon the plaintiffs' construction, the lien was to be *in favor of the company upon its own property.*

Again, it must, of course, have been contemplated that the sovereignty which issued these bonds would keep its plighted faith to its creditors, by paying them at maturity, whether the Railroad Company performed its obligation to the State or not. When the State thus paid its own bond, it would be a *canceled obligation*, and the *lien would fall with it*, if it were the *bond itself* which is the lien.

As before mentioned, it is to be noted that the words "the bonds shall constitute a lien," upon which the plaintiffs place so great reliance, are found only in the *first clause of the third section*, and *relate solely* to the *State bonds issued in aid of the first section* (of thirty miles) of the road, and that lien is only upon that section.

The *fourth* section of the act, providing for the issuing of State bonds in aid of the remaining sections of the road, as constructed from time to time, contains no such language, but simply provides, in appropriate terms, that the State shall become vested with a lien for the payment by the company of the bonds, and of the accruing interest upon them. The provision of the fourth section, that the bonds for the remaining sections of the road shall be issued upon the like conditions as those for the first section, relate plainly to the conditions which are imposed by the *first and second* sections, and which are conditions of the issuing of the bonds under the third section.

After providing for the creation of the liens upon the sep-

arate sections of the road, as constructed, from time to time, for the particular parcels of State bonds advanced in aid of their construction, the fourth section of the act proceeds to declare :

" And when the whole of said road shall be completed *the* " *State of Tennessee shall be invested with a lien, without a deed* " *from the company*, upon the entire road, including the stock, " right of way, grading, bridges, masonry, iron rails, spikes, " chairs and the whole superstructure and equipments, and " all the property owned by the company, as incident to or " necessary for its business, and all depots and depot stations " *for the payment of all said bonds* issued to the company, *as* " *provided in this act ;* and for the interest accruing on said " bonds."

Here we have the statutory mortgage in its complete and perfect form, which may be said to *supersede the previons fragmentary liens*, though it differs not from them in terms or legal effect, but merely consolidates them, and applies all the previous liens upon parcels to the entire line.

And indisputably *at the time of the making of the settlements* between the State and the companies which the complainants now seek to set aside, the *only mortgage liens* then *existing*, or which for many years previously hadexisted, were *these mortgage liens* upon the entire road, *created by the fourth* section of the act, IN RESPECT OF WHICH THE WORDS CONSTITUTE A LIEN ARE NOT USED AT ALL, but there is SIMPLY CREATED A MORTGAGE LIEN IN FAVOR *of the State of Tennessee*, for the company's PAYMENT OF THE BONDS AS PROVIDED BY THE ACT.

Unquestionably these last words refer the questions of *to whom when and how, in paeticular detail*, the *payments* they *required* from the company *as the condition of the mortgage*, are to be made, to the subsequent *provisions of the act*, containing those details.

But there is another unquestionable proposition, which alone completely overthrows all the complainants' assertions to the effect that the words "constitute a lien" in the third section do, by *their* force and operation, make the bonds themselves a lien in favor of their holder.

Howsoever the lien was constituted, the questions would at once arise as practical ones, *to whom is the lien and what is it for?* The making of what payments, or the performances of what obligations, does the lien secure?

If the section left these questions unanswered specifically, and to be determined by inferences from the mere fact of the lien being constituted or created, the language by which its constitution or creation was provided for, might be of great importance.

But the section *does not* leave these questions unanswered. On the contrary, it answers both of them specifically.

It declares that the lien which is to be constituted upon the issuance of the bonds, shall be to *the State of Tennessee as a mortgage lien without deed*, and that the lien shall be "for the payment of the bonds and the interest thereon."

As to the *meaning* of these two declarations, the parties are widely at issue.

We say that the State is mortgagee in its own right and for its own benefit merely. The complainants assert that the State is mortgagee in trust for the bondholders, and while confessedly there is no express statement to that effect, the complainants seek to make it out by inference.

The complainants say that the "payment by the company of the bonds with the interest thereon," which the lien is to secure, is a payment of the principal and interest of the bonds, to be made by the company directly to the bondholders.

On the other hand, we say, that the "payment by the company of the bonds with the interest thereon," which the lien is to secure, is not any payment by the company to the bondholder, for that no such payment was contemplated or is provided for in the operative clauses and provisions of the act, but that on the contrary, the payments secured by the lien are, a payment by the company to the State of the amount of the interest, fifteen days before it becomes due from the State to the bondholder, and the payment by the company to the State of the amount of the principal of the loaned bonds, in yearly instalments, while the State bonds are running to maturity, which payments to the State

on account of principal are to be made, not in money, but in Tennessee State bonds, and this we undertake to make out by referring to the detailed clauses of the statute, showing that it is such payments to the State, and not any payment to the bondholders, which the company is thereby obligated to make.

Now, both of these points of dispute between these parties, as to whether the State is mortgagee in its own right, or as a trustee, and whether the payments secured by the lien are to be made to the bondholders or to the State, are points of great importance, upon the determination of which, in the one way or the other, the rights of the parties in respect of the statutory mortgage lien in question would (supposing the complainants could get rid of the barrier against their claim consequent upon the principle settled in the Chamberlain case) be dependent.

But, however these questions may be determined, the words "constitute a lien," used in the third section, would be of no consequence, one way or the other. The lien being *unquestionably* constituted, the practical question merely is, who is it to, and what is it for?

To illustrate:

Suppose the section were changed, so that the lien vested in the State of Tennessee, instead of being, as it now stands, "for the payment by said Company of said bonds with the "interest thereon as the same becomes due," were "for the payment by said Company to the State of Tennessee, in each year while said bonds are running to maturity, of fifty per cent. of the net receipts of said Company," *all the other language of the section, including the words "they shall constitute a lien,"* being allowed to stand exactly as at present.

Of what avail to the complainants would be the words "they shall constitute a lien" when the lien was declared to be of *such* character and effect?

Now we come to an illustration closer to the actual case:

Suppose we succeed in satisfying the Court, upon examination of the detailed provisions of the statutory mortgage

(as we think it impossible that we shall fail in doing), that by the plainly evident meaning, true construction and legal effect of the words contained in the third section, "for the payment by said company of said bonds with the interest thereon as the same becomes due," those words do *not* refer to, or call for, any payment whatever by the Company to the holder of the State bonds, but, on the contrary, refer to and provide for payments by the Company to the State of Tennessee of the amounts of principal and interest of the State bonds, in advance of the time when such principal and interest will become due from the State to its bondholders, and that such payments of principal by the company are due from it, not in money, but in Tennessee State bonds.

Upon this conclusion being reached, we are unquestionably entitled to have the entire third section read, as if such true construction and legal effect, as thus determined by the Court, of the words "for the payment by said company of said bonds with the interest thereon as the same becomes due," *had been set forth at large in the plainest possible possible language, instead of the words actually used in the section.*

And upon such reading of the section, what possible benefit could the complainants derive from the words "they shall constitute a lien?" The lien being found to be one which secured nothing to them, and could avail them nothing, of what use would it be to discuss whether their bonds constituted it, or the issuing of them constituted it, or for them to waste their time in discussing it at all?

Before leaving the discussion of this particular point, as to the meaning and effect of the words "they shall constitute a lien," we desire to bring to the attention of the Court the last clause of the fourth section of the act; not only because of the very important bearing which certain expressions used in it, have upon the general questions arising in the case, including those raised by the complainants upon the particular branch of it which we are now discussing, but because we think it throws light upon the reason and purpose for and with which the third section provided for the "constitution" of the lien, *i. e.*, the creation, establishment, or institution of the lien, at the commencement of the issues of bonds to a particular company, while it was not deemed

necessary to say anything about the constitution of the lien, with reference to the subsequent issues of bonds.

The last clause of the fourth section is as follows:

"And *after the Governor shall have issued bonds for the first* "*section of the road*, it shall not be lawful for said Company "to give, create or convey to any person or persons or "body corporate whatever, any lienor incumbrance or mort- "gage of any kind, which shall have priority over or come "in conflict with *the lien of the State herein secured*, and any "such lien, encumbrance or mortgage shall be null and void "as against *said lien or mortgage of the State*. And the *said* "*lien or mortgage of the State* shall have priority over all "other claims existing or to exist against said Company."

That the repeated description by this clause of the lien created by the act, as *the lien or mortgage of the State* militates very strongly against the plaintiffs' proposition, that the lien created by the third section is a lien of *the bonds themselves* andfor the *benefit of the bondholders*, and that the State's position as mortgagee is *not* that of mortgagee in its own right, but as trustee for its bondholders, as well as against all the plaintiffs' arguments, whereby they seek to make this in effect, not the State's mortgage, but the bondholders' mortgage, is very obvious, and we shall not fail hereafter and in the proper connection to insist more elaborately upon this consideration. But our chief purpose here, in referring to this last clause of the fourth section is to bring it into juxtaposition with the first part of the third section, and to make a suggestion thence arising.

It will be noticed that the first part of the third section provides that *so soon as* the bonds fort he first section shall be issued, this statutory mortgage lien shall be "constituted," *i. e.*, "erected," "established" or "instituted" according to the definitions of the word which we have before quoted.

And we find that after thus providing for the *constitution, i. e.*, creation, establishment or institution of this *mortgage lien without deed*, so soon as the bonds for the first section shall be issued, nothing is thereafter said about "consti-

tuting" a lien, when or as further issues of bonds are made.

Then we find, in the last clause of the fourth section the provision that *after the Governor shall have issued bonds for the first section of the road, i. e.*, after the State's statutory mortgage shall have been *constituted*, or *established* or *instituted*, as provided by the third section, the Company shall not have power to put any other lien, encumbrance or mortgage upon the road, which shall come in conflict with the State's mortgage.

Upon careful examination and collation of these two provisions, it appears to us to be quite evident, that the idea running in the mind of the draughtsman was to constitute or *institute* the statutory mortgage, as soon as the first issue of bonds should be made, *just as, if the mortgage had been created by deed, the deed would have been executed at that time*, and then to preclude by the statute the creation of any interfering liens *from and after* such constitution or institution of the statutory mortgage, just as, in an ordinary transaction, *a mortgage deed would by its own force* have precluded interference by liens subsequent to its execution.

We feel as if some sort of apology were due for the length and elaboration with which we have discussed the question of the supposed or alleged effect of these words: "They (the bonds) shall constitute a lien," and especially for the minute verbal criticisms upon which we have entered in regard to them. Certainly we have not done so because the point, as taken by the complainants seemed to us to present any apparent difficulty, or to be worthy of serious discussion, for, if trusting to our own judgment upon it, we could only say that the fallacy of this position of the complainants is apparent almost at a glance; nor have we entered into the nice and elaborate criticisms upon the meaning of particular words, from any idea that that kind of discussion is, in the general, of much value in the practical disposition of contested questions, but because the argument on this head which we are undertaking to answer is, as it

appears to us, made up almost entirely by insisting upon the supposed literal meaning of particular words, in disregard of the intent and meaning.

The plaintiffs' brief, on its very first page, starts off with the statement which we conceive to be utterly erroneous, that "by the terms of the act the State bonds *are constituted* liens on the property," and this idea is in various forms repeated and insisted upon, over and over and over, again, as if constant repetition could make it a reality; its basis being merely these words, "constitute a lien," contained in the third section of the act.

In view of the very great pecuniary amount involved in the claims here asserted against our clients, and of the persistency with which the plaintiffs' counsel have pursued their notion of the effect of these particular words, we have not felt at liberty to stop short of a full presentation of the varaious effectual answers to their position on this head which occur to us, notwithstanding our clear conviction that a single one of those answers would be all-sufficient, if, indeed, the position be not so transparently fallacious as hardly to require an answer.

We now come to the ocnsideration of the much more material question, viz., whether the wonds "for the payment of the said bonds and the interest thereon," as used in the third and fourth sections of the act, refer to payments to be made to the bondholders, as the complainants contend, or to payments to be made to the State, as we contend.

Meaning of the words "payment of the said Bonds," or "payment of the interest on said Bonds" as used in the Act.

We do not deny, that if the construction of these words as used in the third and fourth sections of the Internal Improvement Act had to be determined upon the language of those sections alone, without aid from the other provisions of the act or its general scheme and purpose, or

by proper reference to any other fact or circumstance for ascertaining the real meaning, it might fairly be supposed that the words in question were intended to refer to payments to be made by the Company to the holder of the bonds; though, even then, the circumstance that the mortgagor is in no way liable upon the bonds which are to be paid, and that the mortgagee is alone the debtor upon them, would give no little room for the contrary supposition, that the words in question refer to payments to be made *to the party to whom the mortgage is given*, and not to some one else.

But no such task as that of determining this question upon the language merely of the third and fourth sections, without reference to any thing else, is before us.

We have here a mortgage without deed, created by a statute containing many sections. The third and fourth are merely the preliminary sections, *declaring generally* what payments, or the payment of what amounts, the mortgage is made to secure; subsequent sections *specify in detail* when, how and to whom, the payments secured by the mortgage are to be made, these subsequent sections being the "condition" of the statutory mortgage and answering to the clause or clauses of "condition" contained in a mortgage deed; and these subsequent sections, upon careful examination, show, beyond a doubt, that the payments which the third and fourth sections refer to, are not at all to be made to the bondholders, but are to be made to the State.

And, unquestionably, questions of construction which may be presented by language used in a particular section of the statute creating this mortgage, are to be determined with due reference to the other sections of the statute, and to any other considerations properly affecting them, *as in the construction of a mortgage deed made in the terms of the statute.*

But before proceeding to discuss the sections of the statutory mortgage, which provide in detail for the making of the payments secured by it, we desire to show to the Court *in what sense* the *makers of this and similar statutes*, under which State or Government loans of bonds have been made in aid of railroads, have been *accustomed to use* the words

"payment of the bonds," or "payment of the interest on the bonds" in the framing of the statutes.

The practice of Governmental aid, in the shape of loans of bonds, to Railroad Companies, under statutes of the *general* character of the one here directly in question, originated several years before the Tennessee Act of 1852, as will appear from examination of the appellants' brief, and it is plain enough that there was some statute of this nature, enacted long before 1852, which had come to be treated as a "pattern," from which subsequent statutes, including this Tennessee act, were from time to time prepared, with such variations as the draughtsman might deem suitable to his particular case, and certain *set forms and phrases*, some of which are very far from admirable as specimens of grammar, will be found running through the various acts.

And it will be found upon examination, that in such statutes, where it was unquestionably intended to provide, *not* for any payment of the State or Government bonds by the Railroad Company to the bondholder, but for payment to the Government by the Company of its indebtedness created by the loan of the bonds, the practice had grown up, of designating in the statutes, such payments by the Railroad Company to the State *for* the bonds loaned, or of the indebtedness created by the loan of the bonds, as payment *of* the bonds.

We desire, in the first place, to call attention to an instance of this kind, bearing a very close and striking similarity to the Tennessee statute in question, which is exhibited by the United States statute of July 1,1862,before referred to, under which the Government's bonds were loaned to the Pacific Railroad Companies. 12 *U. S Stat. at Large*, 492–3.

This is referred to in Mr. O'Conor's opinion before quoted, as one in respect of which it would be "preposterous," to suppose that the holder of the Government bonds was entitled to any lien upon the railroad.

It is not, and short of mere absurdity could not be, denied, that the obligation which this Pacific Railroad statute really imposes upon the Railroad Company, *is not at all for* any payment of the principal or interest of the United States bonds to the holder of them.

In *fifth* section of the Union Pacific Railroad Act, we find these words:

And to *secure the repayment to the United States, as hereinafter provided, of the amount of said bonds* so issued and delivered to said company, *together with all interest thereon, which shall have been paid by the United States,* the *isssue* of said bonds and delivery to the company shall.*ipso facto,constitute a first mortgage* on the whole line of the railroad, &c.

Of course, there can be no dispute upon the proposition that that mortgage was conditioned, not for the payment of those bonds by the company to the holder of the bonds, but for the repayment to the United States of the amount which they should pay upon the bonds, principal and interest.

And in section six will be found a provision that the *said company may also pay the United States,* wholly or in part, in the same or other bonds, Treasury notes, or other evidences of debt against the United States, to be allowed at par. And in the decision of the Supreme Court, in the case of the United States *v.* The Union Pacific Railroad Company, 91 U. S. R., 85, the proposition that this mortgage is for the benefit of the United States alone, is plainly enunciated.

Yet, *notwithstanding* it thus plainly appears that the obligation of the company, under the act, and in performance of the condition of the statutory mortgage, is for the *payment by the company to the United States of the amount of the bonds,* we find in the *first* part of the sixth section the words following:

"Section 6. And be it further enacted, that the grants aforesaid are made *upon condition that said company shall pay said bonds at maturity.*"

No one can claim that this creates any difficulty as to the construction of the statute, because the meaning is made perfectly plain by what goes before, yet still we find the phrase *used by Congress,* that the company "*shall pay said bonds at maturity.*" Indisputably, when the Act of Congress there says that the company shall "pay the said bonds at maturity," it does not mean that they shall pay them to the holder, but does mean that they shall pay the amount of them to the United States.

Again, notwithstanding the above mentioned condition, that said company shall pay said bonds "at maturity," we find subsequent provisions requiring certain payments on account to be made by the company to the United States *while the bonds are running to maturity*, and these are spoken of as payments "of said bonds."

In another portion of the sixth section of the act we find these words:

"And all compensation for services rendered for the Government shall be *applied to the payment of said bonds and interest until the whole amount is fully paid.*"

This was a provision for the practical application of sums of money becoming due from the United States to the railroad companies, from time to time, in each and every year during the thirty years that the United States bonds had to run. The United States would become indebted, in each year, to the companies, for the transportation of the mails, for the transportation of troops, supplies, etc., and that indebtedness is to be applied, by the express terms of the statute, "to the payment of said bonds and interest." The first payment would be twenty-nine years, the next twenty-eight years, and the next twenty-seven years, etc., before the bond matured. "Payment of said bonds and interest" means here, indisputably, *payment to the United States upon account of the amount of said bonds* and interest, which will *not yet mature for a quarter of a century.*

We find a repetition of the same thing in the latter clause of the section:

"And after said road is completed, *until said bonds and interest are paid*, at least five per centum of the net earnings of said road shall also be annually *applied to the payment thereof*," that is, "to the payment of the said bonds."

Of course, the real meaning and inevitable construction of these words is, that the five per cent. of the road's net earnings shall be *annually* applied as *payment to the Government on account of the company's indebtedness to it for the bonds* loaned, while the bonds themselves, having thirty years to run, are outstanding in the hands of the holders.

We could hardly imagine a plainer case of necessary construction of an analogous statute, in exact conformity with our construction of the words "payment of the said bonds" in the Tennessee statute, than is presented by the Act of Congress in the three separate instances above pointed out.

Again: Although it is indisputable and conceded by all, that the holders of the United States bonds, which were loaned to the Pacific Railroad Companies, have no lien or pretence of lien upon the company's railroad, in virtue of the statutory mortgage held by the United States, and that the lien of that mortgage is merely to the United States for the company's indebtedness to it for the loan of the bonds, we yet find in the Act of Congress of July 2, 1864, by which that and the other Pacific Railroad Companies were authorized to issue certain first mortgage bonds which should have precedence over the lien held by the United States, the following language:

"And the *lien of the United States bonds* shall be sub-
"ordinate to that of the bonds of any or either of said
"companies hereby authorized to be issued," &c. Sec. 10, Act of July 2, 1864; 13 U. S. Stat. at Large, p. 360.

We now refer the Court to a *statute of the State of Tennessee*, relating to a loan to a railroad company of State

bonds, substantially like those held by the complainants, by which a statutory lien is created in the State's favor "*for the payment of said bonds and the interest thereon*," and in which it appears, in the plainest manner possible, upon reference to another portion of the statute, that the Legislature of that State uses these words, "payment of said bonds and the interest thereon," in the precise sense in which we, upon our construction, read the similar words in the third and fourth sections of the Internal Improvement Act, viz., as referring to *payments to the State for the bonds loaned*, and not at all to any payment of the *bonds themselves* to the bondholder.

The statute we refer to is the Act of February 4, 1852, to aid in the completion of the East Tennessee and Georgia Railroad.

It will be observed that it was passed a few days before the Internal Improvement Act of February 11, 1852, the construction of which is now in question. The acts relating to a like general subject, and being passed so nearly at the same time, the general principle in relation to statutes *in pari materia*, is *very completely and forcibly applicable*.

A copy of the entire statute of February 4, 1852, will be found in the Nashville and Northwestern Record, p. 1541–'2–'3.

The first section of the act provides for the loan to the company of $100,000 Tennessee State bonds, to mature in *not less than thirty nor more than forty years*, to provide for the construction of the railroad bridge across the Tennessee River.

The third section, copy of which will be found also in appellants' brief, page 344, creates the statutory mortgage to the State "for the security of the *payment of said bonds and the interest thereon accruing*."

Page 345 of appellants' brief gives a copy of certain portions of the second section of the act, but it omits other

portions of it, which we regard as highly material, and we therefore give here the whole of the *second section*, as follows:

"That for the purpose of enabling the said company to raise a fund for the payment of *the interest on said bonds*, and also *to pay the principal thereof at or before maturity*, the said company are *authorized and required* to demand and receive from *all passengers crossing said bridge in said railroad cars*, in addition to the regular charges, the further sum of *ten cents on each passenger as bridge toll*, and it shall be the duty of the said company to collect the said sum at the same time the regular passage money is collected, and to render a monthly account thereof, and *pay over monthly the said sum in some bank at Knoxville*, taking the receipt of the bank therefor, and the sum so deposited in bank shall at all times be subject to the check of the Comptroller of the Treasury, for the payment of the interest on said bonds, and any overplus after the payment of said interest shall be *passed to the credit of the company in discharge of the principal due on any one or more of said bonds*, provided that as soon as the *interest and principal of said bonds shall be paid*, the said company shall be *released from the exaction of said additional charge*."

Nashville & Northwestern Record, pages 1541–'2.

Upon examining this second section we find very clearly what the Legislature of Tennessee, in February, 1852, meant by the words "payment of the principal of said bonds" when they used those words in declaring the purpose and effect of a statutory mortgage of this character, and that that meaning was, *not* payment of the *bonds themselves to their holders*, but *payment to the State* of the *amount of the bonds*.

In this statute provision was made for the issue and loan to the company of ordinary Tennessee State bonds, just like those held by these complainants, payable to the bearer, and having *not less than thirty years* to run. The bonds, of course, would be sold, and be in the hands of unknown holders, probably at the East or in Europe, who could not

be reached in order to get up the bonds from them before maturity, and who, if they could be found, would not be bound and could not be expected, to surrender the bonds before maturity, as they would be held for investment. The act discloses no intention thus to take them up before maturity, and it is very plain that there was no such idea.

Then this section *authorizes and directs* the raising by the company of a special fund, by the exaction of a special toll of ten cents from each railroad passenger crossing the bridge, in order to provide for paying the interest on the bonds, and then to "pay the *principal thereof at or before maturity.*"

Before maturity the principal of the bonds *could not* be paid *to the bondholder.* Manifestly it *could be paid only to the State.*

But this is not left to inference. It is provided for most explicitly. The section provides that the company shall pay over the amounts of the bridge tolls monthly to a bank at Knoxville, *subject to be checked outby the Comptroller of the State*; and then, that the surplus after payment of the current interest shall be *passed to the credit of the company* in *discharge of the principal* due on any one or more *of said bonds.*"

We thus see that when these payments on account of principal are made they are *not to be at all made to the bondholder.* The money is to be checked out of the bank by the State, through the Comptroller, and thereupon the State is to *pass it to the company's credit* in *discharge of so much of the principal due on the bonds.*

We do not understand the appellants' counsel, in their argument upon this matter, contained in pages 345 and 346 of their brief, to deny that, upon these payments being thus made, and passed to the company's credit in discharge of so much of the principal due, the statutory mortgage would be discharged *pro tanto*, and that, upon the whole principal

being thus paid to the State, the statutory mortgage would be completely satisfied and discharged; and if they should undertake to assert the contrary, their assertion would need no argument to refute it.

And it is very certain that after the payments thus made to the State, and by it passed to the company's credit, had fully discharged the principal due by the company on the bonds, and the *statutory mortgage*, given, just like the one now in question, "for the security of the *payment* of said bonds," had been thereby *discharged and cancelled*, *not a dollar of principal would have been actually paid to the State bondholders.*

And in the last clause of this second section we find another very complete evidence of what in February, 1852, was meant by the Legislature of Tennessee by the use, in a statute and statutory mortgage of this nature, of the expression "payment of the said bonds."

The last clause of the section is as follows:

"Provided that as soon as *the interest and principal of said bonds shall be paid*, the said company shall be released from the exaction of said additional charge," *i. e.*, the bridge toll of ten cents per passenger.

Of course it will not be denied that these words refer to the payments made to the State in pursuance of the previous portion of the section, *and that they speak of the principal of the bonds as being paid, when merely the amount of the principal has been paid to the State, leaving the bonds themselves outstanding in the hands of the bondholders.*

We have thus clearly ascertained from careful examination of this cotemporary statute, *in pari materia*, that upon such a transaction as this and under such a statutory mortgage as this, the understanding, and intent and meaning, of the Legislature of Tennessee, were as follows:

1. That the loan of the bonds *creates an indebtedness from*

the company to the State for the amount of the bonds loaned, and that the mortgage is given to *secure the payment to the State of that indebtedness.*

2. That the words in the statutory mortgage "payment of the bonds" do *not* mean payment of the bonds themselves to the holder, but *do* mean payment to the State of the amount of the bonds.

3. That payments made by the company to the State, are *in discharge* to the company of so much of the amount due by it "on the bonds" as those words are used in the mortgage, and *in discharge of so much of the debt secured by the mortgage.*

4. That the statutory mortgage is a matter wholly between the company and the State, and the State bondholders have no claim or interest under it and nothing to do with it.

We do not wonder that the appellant's counsel, finding themselves, as upon reference to pages 345–6 of their brief, is manifestly the case, unable to give any substantial *direct* answer to the very strong argument in our favor deducible from this bridge statute of February 4, 1852, should desire to get rid of its effect by a *side movement;* but it seems to us that the attempt they make in this direction, may fairly be pronounced ridiculous.

They manifestly feel the force of the difficulty, that under the working of this second section of the Bridge Act, the lien of that statutory mortgage "for securing the payment of the said bonds" would be discharged by means of payments made to the State, without any payment having been made to the bondholders, and they undertake to get rid of it on page 346 of their brief by saying, "But our antago-
"nists take nothing from this act, for as we shall presently
"see, *this incongruity was detected by the Legislature of*
"1853–4, (the italics are ours) and its effect limited to the
"single bridge to which this act applies."

And then, on pages 350 and 351 of appellants' brief, comes what we were "presently to see," as follows:

"THIRDLY.—In the second section, *the legislative sense of the contradiction and incongruity of thought contained in the Act of February* 4, 1852 (the italics are ours), is fully shown. This section provides that State bonds shall issue to the twenty-three companies named in the first section of this act, and the tenth and nineteenth sections of the Act of February 11, 1852, for each bridge over the Holston, Clinch, Big Hatchis, Tennessee and Cumberland Rivers, for the maximum sum and upon the terms and conditions mentioned in the Act of February 4, 1852.

"Except the second section."

And in the fifth and sixth sections of the Act of February 26, 1852.

The third section of the Act of 1854, above referred to, is in Nashville and Northwestern Record, pages 1455 to 1459. Its date was February 8, 1854.

This proposition of our learned adversaries, that the Legislature of 1854 had become troubled by "*a sense of the* (alleged) *contradiction and incongruity of thought*" contained in the Act of February 4, 1852 (which our adversaries now find so troublesome to them), and that *for that reason*, they took care to avoid such "contradiction and incongruity of thought," in their own legislative work, by "dropping out" the "second section" of the Act of February 4, 1852, when they applied the *terms and conditions* of that act to the State aid in bonds which by their own Act of February 4, 1854, they granted to the *twenty-three designated companies* for each of their bridges over any of the *five designated rivers*, strikes us as being rather extraordinary.

We suppose our learned adversaries would have it now believed, that the Legislature of 1854 perceived how destructive the use of such language as is contained in the second section of the Act of February 4, 1852, would necessarily be, to the maintenance of the theory, that these statutory mortgages belonged in effect to the State bondholders and not to the State, and that, therefore, in tender

regard for the interest of the State bondholders, they took care to avoid doing any such mischievous thing themselves. Even if this were so, we do not see how it would help our adversaries out of their difficulty, caused by the manifestation by the Act of February 4, 1852, *of the sense in which the Legislature of that year* understood the words, "payment of the said bonds," when they used them in statutes of this character.

But really, the reason now imagined by the appellants counsel, for this second section of the Act of February 4, 1852, being dropped out of the Act of February 8, 1854, is preposterous.

The change was not made for any such mythical reason as is now suggested by the fertile imagination of our learned adversaries. Indeed, the uncontradicted evidence in this case shows, that *as matter of fact*, the idea of these statutory mortgages being liens belonging beneficially to the holders of the State's bonds, was not in the mind of any one in the years 1852 or 1854.

That idea was not discovered or invented until many years later.

The reason of dropping out the second section of the Act of February 4, 1852, in the Act of February 8, 1854, is perfectly manifest. It was a purely practical *business* reason, and had no relation whatever to any legal or technical difficulties or questions.

The *entire subject matter* of this "dropped out" second section of the Act of February 4, 1852, was, *the imposition of the special toll of ten cents on each passenger crossing the bridge* in the cars, and the disposition of the fund thus raised.

And the alleged "contradiction and incongruity of thought," occurs in the provisions for the *disposal of the fund raised for such bridge tolls.*

The *reason for dropping out* this second section of the Act of 1852 in the Act of 1854, was *simply*, that in *the business scheme of the latter act*, there was *no plan of imposing a special toll upon the passengers crossirg the bridges* of the twenty-three companies.

Let us now refer to another section of the Internal Improvement Act itself, in which the words "payment of the bonds" are used, and in which it is, from the section itself, plainly apparent that they are used, not in the sense of payment of the bonds themselves to their holders, but of payment to the State of the amount of the bonds.

The first and second sections of the Internal Improvement Act carefully provide that the State bonds loaned to the companies shall be used for no other purpose than ironing and equipping the road, and that no bonds whatever shall be issued until the company shall have procured *bona fide* stock subscriptions, which shall be "good and solvent," to an amount sufficient to grade, bridge, and prepare for the rails the entire main trunk line, and that the bonds for no section shall be issued unless the company shall have actually graded and prepared it in a good and substantial manner, and have on hand and in readiness the necessary materials for laying down the rails.

It was feared that there might occur some frauds by obtaining State bonds without compliance with these conditions, so essential to the State's security, and to provide for that contingency, the thirteenth section directs that upon its being discovered that such a fraud has been committed, a suit shall be brought, on behalf of the State, in the Circuit or Chancery Court, of the County of the Company's place of business, setting forth the facts; and that if the fraud shall be established to the satisfaction of the Court, the road and other property of the company shall be sold out under decree of the Court, and the proceeds paid into the State Treasury, where it was to be invested, and kept invested, in Tennessee State bonds, "creating a sinking fund," and that in such case the *stockholders* of the company shall be *individually liable* "for the *payment of the bonds*" so fraudulently obtained by such company * * * * "*excepting such stockholders* as may show to the *said* Court" that they were innocent of the fraud. And to avoid any difficulty in ascertaining who the stockholders were, who were to be subjected to this personal liability, it was provided, in the last clause of the nineteenth section, that

before any bonds shall be issued, the President of the company shall first deposit, in the office of the Secretary of State, a "full, true and accurate list of all the stockholders."

It is plain enough that if any suit were brought under this thirteenth section, it would be within some comparatively short time after the issuing of the State bonds. If the company were a fraudulent or bogus concern, it would not keep on paying interest for thirty-nine years, or for nineteen years, or for five years. If the obtaining of the bonds had been a fraud, the fraud would of necessity come to light pretty quickly. When it was discovered the suit was to be brought—and if we should estimate that by the time of its being brought to a head, and the final decree rendered, five years would have elapsed, of the forty years which the bonds had to run, the estimate would in all probability exceed the reality.

And it is equally plain that the *individual liability* which this section imposes upon the stockholders is to be *determined and enforced* in *this very suit* brought under the thirteenth section, and coming to a conclusion, say thirty-five years before the bonds become due.

The section says that the suit is to be brought by the State, without saying against whom, but clearly, it is intended to be against both the company and the stockholders, because the relief is to be against both.

It is declared that the stockholders shall be individually liable for the payment of the bonds, excepting such stockholders as may show to the *said* Court (*i. e.*, the Court before whom the suit is brought, and to whose satisfaction the commission of the fraud is to be proved), that they are innocent of the fraud.

Now, it surely will not be pretended that it was the meaning of this section, that the Court, after determing that the fraud had been committed, and which of the stockholders were innocent and which guilty, instead of making a practical decree requiring the guilty stockholders to pay to the State the amount for which they were thus found to be individually liable, should make a decree, that at the ma-

turity of the bonds, thirty-five years afterwards (before which time nearly all the stockholders would be in their graves and their estates distributed), the stockholders should pay the State bonds to their then holders respectively, each stockholder contributing his due proportion of the payment to each bondholder—a decree which, with reference to all purposes of practical value, would be absurd, and almost or quite worthless.

The bonds being securities payable to bearer, having between thirty and forty years still to run, would be out in the hands of unknown owners, who had purchased them (probably paying a premium), for a permanent investment of their money, and who were neither bound nor could be expected to accept payment of such bonds before the time of their maturity. Moreover, the provision for creating a *State sinking fund* out of the proceeds of this sale, for the *ultimate* payment of the bonds which had been loaned to the fraudulent company, clearly indicates the understanding of the Legislature that the time for the payment of those bonds by the State to their holders would be the time of their maturity according to their tenor, and not the time when the remedies provided by the thirteenth section should be put in force.

In short, it is too plain for dispute, that the individual liability which this section imposed upon stockholders, for *the paymnet of the bonds* fraudulently obtained, and for all *other losses* that may *fall upon the State* in consequence of the frauds, was intended and had the effect to make the stockholders individually *liable to the State*, and to compel them to make present *payment to the State for the amount of the bonds* which had been fraudulently obtained from it, and that such individual liability was to be actually enforced against the stockholders in the suit in equity which this thirteenth section provided for.

THE CLAUSES OF THE STATUTORY MORTGAGE PROVIDING IN DETAIL FOR THE PAYMENT OF THE PRINCIPAL AND INTEREST OF THE INDEBTEDNESS SECURED BY IT, AND PROVIDING THE REMEDIES FOR ENFORCEMENT AND COLLECTION IN DEFAULT OF VOLUNTARY PAYMENT.

We come now to the examination and careful consideration of the portions of the act in question—*the statutory mortgage*—which provide in detail for the payment by the company of the principal and interest of the debt secured by the mortgage, and provide the remedies for the collection of such principal and interest, by enforcement of the mortgage security, in the event of the mortgagor's default in performing the condition of the mortgage; to the end of thereby ascertaining whether the payments of principal and interest, for securing which the third and fourth sections of the act declare the mortgage to be created, are, by the terms or "condition" of the mortgage, required to be made to the State of Tennessee, or to the holders ot the State bonds. *Certainly this must be to either the one party or the other. It cannot be to both.*

We have here a mortgage, created by the statute, without deed, which mortgage is declared to be for the purpose of securing a certain payment to be made by the mortgagor, and the question to be decided is, to whom that payment is, by the terms of the mortgage, secured or required to be made. If this were a mortgage deed, we should, of course, refer, for determining this question of the meaning and effect of the preliminary clause, declaring for what end and purpose the mortgage is executed, to the subsequent operative clauses of the mortgage itself. We should inquire: What is the condition of the mortgage as subsequently expressed? What acts does it require the mortgagor to perform? For the non-performance of what acts by the mortgagor, does it declare there shall be deemed to be a default and an enforcement of the remedies provided by the mortgage? What remedies are provided by the mortgage, and in whose favor? And, supposing those remedies to be put in operation, according to their tenor and necessary effect, who, by the terms of the mortgage, is entitled to institute

and enforce them? And who is to collect or receive the fruits of such enforcement? And just as we should examine the clauses of a mortgage deed, if there were one, for the purpose of answering these questions, we are to examine the corresponding clauses of this statute for the like end and purpose.

Let us now make these inquiries:

(1.) In respect of the interest upon the bonds; and

(2.) In respect of the principal.

1. The PAYMENT OF THE INTEREST as regulated by the FIFTH SECTION.

The provisions *requiring* the company to *make payment of the amount of interest*, and declaring *what shall be a default in that respect*, and providing *remedies for the collection* of the amount *in case of such default*, are contained in the *fifth* section of the act, and *no provision requiring any such payment* to be made by the company to any one, or providing for any remedy against, or collection from the company or its property, in case of non-payment of the interest, *is to be found anywhere else in the act.*

The fifth section provides that "it shall be the duty of "the company to deposit in the Bank of Tennessee, at Nash- "ville, *at least fifteen days before the interest becomes due* upon the "bonds, an amount sufficient to pay such interest, including "exchange and necessary commissions, or satisfactory evi- "dence that said interest has been paid or provided for, and "that if the company fails to deposit said interest as afore- "said, or furnish the evidence aforesaid, it shall be the duty "of the Comptroller to report that fact to the Governor, "and the Governor shall appoint a Receiver, &c."

Now; certainly, here is not found any provision for the payment of the interest by the company to the holder of the State bonds, either at or after the time when it becomes due or at any time, but, on the contrary, the company is required to pay the interest to the State, by means of *payment to the Bank of Tennessee, which is the State's fiscal agent*, of

the amount of interest *fifteen days before the time when the interest will become due to the State bondholder.* And in case of failure thus to make payment to the State, through its fiscal agent, of the amount of the interest *fifteen days before it becomes due from* the State to the bondholder, there is a *complete default on the part of the company*, and this is the *only default* for which there is any provision of remedy contained anywhere in the act, *i. e., in the statutory mortgage.* And the remedy provided for it, is the very complete one, of an appointment by the Governor of a Receiver, who is to take possession of the road and operate it, until, from its net receipts, he has collected the amount of the interest due, *which amount he is to pay into the State Treasury;* and upon having thus collected from the income of the road the amount of the interest, he is to surrender the road to the company.

But it is argued by the appellants that this is not a provision for the *payment* of the interest by the company *to the State or its agent*, but merely a provision by which the company is to *deposit* the amount of the interest *in the Bank of Tennessee, as its (the company's) agent*, and that then the bank, *as the agent of and on behalf of the Railroad Company*, is to pay the interest to the holders of the State bonds; but it is certain that no such idea is in any way expressed, or declared or implied, by the act itself. The idea rests purely upon the imagination of counsel.

2. The RELATION of the BANK OF TENNESSEE to the State.

In this connection it becomes material to ascertain with clearness, the actual relation of the Bank of Tennessee to the State of Tennessee.

The Bank of Tennessee was the State's fiscal agent, through whom all the financial transactions of the State were conducted.

It was *for all practical purposes the treasury* of the State of Tennessee, *the State having no other treasury*, nor any other *physical means or appliances practically provided for* the *safe-keeping* or disbursement of its moneys. All the State's revenues or other means, when collected or received, were paid into the Bank of Tennessee to the State's credit, and

all disbursements on the State's account were made by the bank, either by honoring checks or warrants drawn upon it by the State officials, or by direct payments by itself as the State's fiscal agent, without any such check or warrant. Record, pages 1060-61.

But the bank was *not merely the fiscal agent* of the State. The Bank of Tennessee was a bank *established and wholly owned and controlled by the State, which had furnished its entire capital and was its sole stockholder*, appointing or controlling the appointment of all its managers and officers, *and the State was, by express provision of law, responsible for the fulfillment of all the bank's engagements.*

This bank was established by an act passed January 19, 1838, chap. 107, of the Laws of Tennessee of that year. We here quote certain material sections of it:

CHAPTER 107,

LAWS OF TENNESSEE, 1838.

" An Act to establish a State Bank to raise a fund for in-
" ternal improvement and to aid in the establishment of a
" system of education.

" SECTION 1. Be it enacted by the General Assembly of the
" State of Tennessee, that a bank shall be and is hereby es-
" tablished *in the name and for the benefit of the State*, to be
" known under the name and style of 'The Bank of Ten-
" 'nessee,' and the *faith and credit of the State are hereby pledged*
" *for the support of the said bank, and to supply any deficiency in*
" *the funds hereinafter specifically pledged, and to give indemnity*
" *for all losses arising from such deficiency.*

" SEC. 2. Be it enacted that the capital of said bank shall
" be *five millions of dollars*, to be raised and constituted as
" follows: the whole of the common school fund whether
" the same is vested in stock in the present banks in the
" State or in the hands of the Superintendent of Public In-
" struction, or in the hands of the county agents or other
" persons, except so much as may have been vested in any
" works of internal improvement, as well as the proceeds of
" the Ocoee lands, shall constitute a part of the capital of

" the bank of Tennessee. The surplus revenue on deposit
" with theState,together with the unexpended interest there-
" on, shall also constitute a part of the stock of said bank;
" ann in addition to these amounts, a sum shall be raised in
" specie, or funds convertible into specie, at par value, on
" the faith of the State, sufficient to make the whole capital
" five millions of dollars,provided that if the fourth instalment
" of the surplus revenue apportioned under the act of Con-
" gress approved 23d June, 1836, should be deposited with
" this State, the amount received shall be added to and con-
" stitute a part of the capital of said bank, and be an addi-
" tion to the capital stock of five millions of dollars above
" specified, provided further, that the stock owned by the
" State in the Union Bank shall not constitute any portion
" of the capital of the Bank of Tennessee."

The absolute and complete responsibility of the State of Tennessee for the engagements of this bank is fully recognized by the decision of the Supreme Court of the United States in the case of Keith *v.* Clark, 97 U. S. R., 454. See opinions of WAITE, Ch. J., on page 467, and BRADLEY, J., on page 472.

Judge Bradley says: " In pursuance of the idea that the " Bank was the property of the State, *and that the faith of* " *the State was pledged for its obligations*, it was provided by " the twelfth section," that the bills of the bank shall be receivable in payment of taxes, &c., &c.

Such being the relations between the State and the bank, of responsibility by the State for the engagements of the bank, which it owned and which was its mere instument, and the bank being practically the State's Treasury and the only treasury or strong box for the keeping of moneys which the State had when the Railroad Company paid to the bank in pursuance of the express condition and obligations of the statutory mortgage that it should do so, an instalment of semi-annual interest upon the indebtedness secured by the mortgage, it had thereby completely and forever discharged itself from all obligation for or in respect of that instalment of interest.

It was in all substantial effect a payment into the State Treasury.

At all events, it was a payment *to the State* through the bank as its fiscal agent, and that is the material point.

The Railroad Companies were to pay and did pay the money into the bank to the State's credit just as the collectors of taxes brought in and paid to the bank the money which they had collected. In those days, if a tax collector had walked in with $5,000 to the Treasurer of the State of Tennessee and proposed to pay it to him, the Treasurer would have said: "I have no place to keep this money; no safe; you must go and put it into the Bank of Tennessee." And this arrangement of the State's finances was simply the use, in the State of Tennessee, under the statute enacted in 1838, of a fiscal agent of the State, similar to that fiscal agent of the Government which had been established by the United States of America in the regulation of its finances. Until 1834 the United States had no more a treasury, other than the United States Bank and its branches, than at the time of the enactment of the Law of 1852 the State of Tennessee had, other than the Bank of Tennessee and its branches; and in those days, before 1834, the only method of getting into the Treasury of the United States the sums collected for duties or other revenue, was the deposit of the money to the credit of the Government in the Bank of the United States or some of its branches.

The criticism which the appellants' counsel undertake to make, because of the use of the word "deposit" in the requirement of this fifth section for the paying into the bank by the company of the instalment of interest which it owed, is a mere petty quibbling upon words. The word "deposit" is an usual and appropriate word to be used, for describing the act of paying in to a bank, to the credit of the person to whom you are indebted, the sum which you owe him, *in pursuance of his direction to you to do so.* It is an every day practice thus to pay a debt by depositing the money to the credit of the creditor, in the bank designated by him for the purpose.

The Legislature of Tennessee, when it enacted this statute, was not intent upon any such hair-splitting upon the meaning of the words "deposit" or "payment" as the appellants' counsel now assert. They adverted to the practical point of taking the money out of our pocket to pay that amount of interest, and putting it into the State's hands, so that it might be put in funds for the payment of the interest due from it to its bondholders, in ample time before that interest would become due from it.

And here, for *conclusive evidence* that when the Legislature were enacting this law of February 11, 1852, they did not have in mind any such nice distinction between the words "deposit" and "payment," when speaking of paying in to a bank money which was to be in effect paid to the State, but used both words indiscriminately and as synonymous in such connection, let us again refer to section two of the "Bridge Statute" of February 4, 1852, which is set forth at large on page of this brief, and there referred to for another purpose.

By that second section it is provided, in respect of the special fund derived from the bridge tolls, that the Railroad Company shall "*pay over* monthly the sum so collected "monthly in some bank at Knoxville, taking the receipt of "the bank therefor; and the *sum so deposited* in bank shall "at all times be subject to the check of the Comptroller of "the Treasury," &c.

The appellants' counsel now insist that the Bank of Tennessee, when it came to make the actual payment of the interest to the State bondholders, did so as *our* agent; and for consistency they must, of course, claim, that after the "deposit" was made in the bank, fifteen days previously, it still remained *our* money, and that the deposit was to be and remain to *our* credit.

They *do* claim, in so many words, on page 195 of their brief, that if the bank had failed, the loss would have fallen on the company, for, as they say, "the money was only on deposit with the bank."

Now, we ask the question, if the money deposited was to be to *our* credit, and was to *remain our money*, what good

would it do the State to require us to make *such* a deposit fifteen days before the interest should fall due?

Again: The appellants argue that the bank was to make the payment to the bondholders for us and as our agent, and that the deposit or payment of the money by us to the bank was a deposit with or payment to *our own agent.*

Now this much is certain, that whatever was the character or effect of this deposit in the State's bank, the *failure punctually to make such deposit*, fifteen days before the interest became due to the holders of the bonds, was a *default in the condition of the statutory mortgage*, and was instantaneously to have the effect of entitling the State, as mortgagee, to *turn us out of possession* of the mortgaged premises, take possession for itself through a Receiver summarily appointed by its Governor, and through such Receiver *collect from the income and profits* of the mortgaged premises and *put into the State Treasury*, a sum *precisely equivalent to the* amount of the "*deposit*" which we had failed to make.

Now, bearing in mind these results of a failure to make the required "deposit" in the Bank of Tennessee, we ask two questions:

1. How *can it be possible*, that the failure to hand over a sum of money to *our own agent*, should be a default in the condition of this mortgage so as to subject us to such consequences?

2. As unquestionably, the consequence and result of our failing to make the deposit voluntarily, is the compulsory collection *by the State* from our property, of the precise amount which we failed to deposit voluntarily, and as unquestionably the State could not have collected such amount or any part of it, except we had failed to make the deposit, is there any room to doubt, that the voluntary deposit in the State's bank was designed to place the money in the State's hands, just as it would be if compulsorily collected because of the failure to make the deposit?

We submit that there can be no intelligent doubt as to the necessary answers to these questions.

Again:

It will be observsd that the statute *gives no direction whatever*, as to what is to be done with the money deposited under the fifth section. It *treats the matter as ended*, as between the parties to this mortgage, by the making of the "deposit" or payment, as of course it is, treating the deposit as a payment by the company to the State of its indebtedness for the six months' interest, according to our version of the transaction.

If it were designed that subsequently to the deposit, the bank should act as the company's agent for paying the interest to the bondholders, surely there should be something in the statute declaring or regulating the agency.

But there is nothing of the kind—not even a glimmer of anything from which such assumed agency can be deduced. The idea of there being such an agency has no other basis than the imagination of counsel.

Treating the matter according to our version of it, *i. e.*, the deposits in the Bank of Tennessee under the fifth section as payments by the Railroad Companies to the State of the amounts of interest due by them, it was *not at all needful that the act should* contain any further provisions in relation to the practical payment of the interest to the bondholders, in order to the accomplishment of that result in the due and regular course of business.

The payments or "deposits" thus made by the Railroad Companies to the bank as the State's fiscal agent, would be, as of course, passed by the bank to the State's credit, and thus compose a part of the State's general cash balance in the bank, available for all the State's payments and purposes. And it appears in the evidence and is uncontradicted, that so long as the Bank of Tennessee remained in regular operation, up to the breaking out of the war, this was the course actually pursued. All these "deposits" or payments

by the railroads were received by the bank as being payments made to the State, and the amounts were all passed to the credit of the State Treasurer.

And it was not needful that the bank should receive from directions, of this statute or otherwise, any special instructions, in order that it might go on and pay the interest on the State bonds which had been loaned to the Railroad Companies.

Under the third section of the Act of February 9, 1850 (Nashville and Northwestern Record, page 2063), which was in force at the time of the passage of the Internal Improvement Act of February 11, 1852, and so continued ununtil the breaking out of the war, the Bank of Tennessee was required to act as the agent of the State in paying the interest on the State's bonds, and, accordingly, the bank's course of business was to pay for account of the State the interest on all the State bonds, including those loaned to the Railroad Companies under the Internal Improvement Act, and to charge to the account of the State the amount of interest so paid.

Some notice should, we think, be taken of the provisions contained in the fifth section, requiring the Railroad Companies to include the amounts of "exchange and commission" in their semi-annual payments for interest, and likewise of the *option* which the fifth section gives to the companies, instead of making the interest payments to the bank for the State, fifteen days before the interest becomes due, to furnish to the bank by *the same limited period, i. e.*, fifteen days in advance, "satisfactory evidence that said interest has been paid or provided for."

The circumstance connected with the payment of the interest falling due upon the bonds every six months during the term of forty years, by reason of which the Legislature thought it fitting to give us the *option* of paying, or providing for the interest ourselves, if we chose, instead of paying it directly to the State in advance of its maturity, to supply to the State the funds with which to pay its own debt was,

that the railroad companies being in Tennessee, the bonds, in order to enable them to be circulated among Northern capitalists, were made payable, or it was supposed that they would be made payable, in some of the Northern cities, as, in fact, they were. We believe they were all made payable in New York. In those days, before the national banking system (and perhaps in a modified way, or to some extent, it may be so yet), there was a cost or commission, as it was called, charged by banks in the Northern cities for transacting business of this character; and there was an exchange to be paid for the transmission of the funds from Tennessee, where the railroad companies were, to New York, where the interest was to be payable. Undoubtedly, it was the meaning and the clear intent of this act (never departed from in the least degree) that the State should not be a loser in respect of incidental expenses by reason of loaning its bonds to these companies. Every little petty expense, as the learned counsel for the plaintiffs insisted in the Circuit Court, was to be paid by the railroads. That does not, in the least, bear against our theory of this case. We were to pay all incidental expenses. The State was not going to accept from us in Nashville $50,000 in satisfaction of our obligation to provide for this interest, if it was going to cost the State $50,500 to put that money in New York, and have the interest paid there to the bondholders. The State saw fit to give us the opportunity of bargaining, if we chose, to get the amount of that exchange and commission, which we had got to pay, down to as low a rate as we could; but, if we wished to avail ourselves of that privilege, we must get through with the business, and satisfy the State officers, fifteen days before the interest became due, that we had put the money in New York in such shape that inevitably the interest would be there paid. Unquestionably, the real moving cause of giving us this option to provide for these payments ourselves, instead of having the State pay its own interest, was to give us an opportunity to bargain for, and get the amount of exchange and commission as low as we could. Our right was not absolute. We were obliged to do it in such form as that it should be satisfactory to, and be accepted by, the officials of the State. If not, we must make the payment to the State at Nashville, fifteen days before

it was required to pay its interest to pay its creditors. It is a mere truism to say, that the condition of this mortgage is to be tested, *not by what* we had *the option* of doing, by way of a substitute, but by *what we were obliged to do*, whether we wished to or not. *That is the condition* of the mortgage—the *thing which we were bound to do*, and not the substituted thing which we had the right to do if we saw fit. What were we bound to do? The State had had a system of indorsed bonds for the railroads. Under that system, it a railroad company defaulted in the payment of its interest, it did not hurt the credit of the State that the Railroad Company went to protest. It does not hurt the credit of a millionaire that a note in bank for a thousand dollars, bearing his indorsement, goes to protest. When the State changed the system, and substituted for indorsed bonds (in respect of which they could afford to run ths risk of the principal and interest being paid promptly) the system of issuing their own bonds, upon which the interest must be paid inevitably and promptly, and the consequence of any default in the payment of which, even for a day, would be of enormous prejudice to the credit, and not only to the credit, but to the pride and honor of the State—they took care to provide, in the most explicit terms, that the Railroad Company, if it wished to avail itself of the privilege of paying the interest to the State bondholders itself, must make that provision in the clearest manner, fifteen days before the time when the State credit must be protected at all events; and, unless they made the substituted provision in some way that was satisfactory to the State, the Railroad Company was absolutely bound to pay to the State, fifteen days before the interest became due to the bondholders, an amount sufficient for the State's payment in New York of the interest which would become due from it there at the end of the fifteen days, and for the incidental expenses of exchange and commission which are here refered to. And, unquestionably, the particular phraseology which you in this act find—"an amount sufficient to pay the interest with the exchange and commissions" is used instead of saying "the amount of the interest," because of this unknown quantity of exchange and commission. But for that circumstance, the language used would probably have been in

substance "pay into the Bank of Tennessee the amount of the interest."

We will now answer an argument which was made by our adversaries in the Circuit Court, and which may, perhaps, be repeated here.

In discussing the question relating to the company's obligation under this statutory mortgage in relation to the payment of the semi-annual interest on the amount of the borrowed bonds, we attribute great force to the circumstance, that the *only provision of the mortgage requiring us to make any payment* for or in *respect of* the *interest* was this fifth section requiring us to pay the amount to the State through its bank, fifteen days before the interest becomes due from the State to its creditors; and that the only *remedy* provided by the statutory mortgage, tor compulsory collection of the semi-annual interest, is the Receivership provided in the fifth section, the result of which unquestionably is, the collection by the State and payment into its treasury, of the amount of the interest.

In answer to these propositions, our learned adversaries bring forward the doctrine, that where in a mortgage, provision is made for a specified remedy, that provision does not *of necessity*, exclude other remedies, which would be applicable under general principles of law or procedure, if no special remedy had been provided.

That such a general principle exists and is *in many cases* applicable, we, of course, do not deny. That a remedy specially given, does not *always and of necessity*, exclude such remedies as the general rules of law or procedure would give, if no special remedy was given, is certain.

The special remedy *may or may not* exclude another or others, according to *the particular circumstances of the case.*

It is difficult, if not impossible, to lay down in the abstract, any *general comprehensive rules* upon the subject.

But we think it safe to lay down this, as one sound, general rule upon the subject, viz., that remedies cannot be had under the general rules of law and procedure, *inconsistent with and subversive of* the remedy specially given (supposing of course, that remedy to be lawful and valid.)

And applying that as a sound rule to the circumstances

of this case, we submit that it clearly makes it impossible for our learned adversaries *to gain anything for themselves practically* in this case, by invoking the general doctrine above adverted to.

For indisputably this statutory mortgage does give to the State of Tennessee, as a contract right, the special remedy provided by the fifth section, for *collection by the State and payment into its treasury*, by means of the statutory Receivership, of the amount of the semi-annual interest due by the company on the amount of the borrowed bonds, and it would be wholly *inconsistent with and subversive of* that special remedy, and the State's contract rights in respect of it, to allow the State's bondholders, by other remedy under general rules of procedure, *e. g.*, suit in equity, to collect and put into their own pockets *that same amount* of semi-annual interest due by the company. And certainly it is too plain for dispute, that the company cannot be held liable to pay, nor lawfully be subjected to have collected out of its property, *twice over*, the single debt that it owes for the semi-anuual interest on the bonds it has borrowed.

But in truth it seems to us that the principle in relation to *remedies* which our learned adversaries invoke, has nothing to do with the great intrinsic difficulty which they are seeking to combat, which is, that, under this mortgage, the sole obligation imposed upon the Railroad Company, in respect of the semi-annual interest, is to make the payment to the State, through its bank, which is provided for by the fifth section, and if that obligation be fulfilled, there is and can be *no other default*, in respect of the interest.

In respect of a given six months' interest, the *obligation* upon the mortgagor is *to pay that amount of six months' interest, and it is nothing else than to pay it.* Whenever the mortgagor has paid it, that portion of the mortgage is satisfied. Without stopping to play upon words, and rejecting, as wholly unworthy of such a subject, any hair-spliting upon the meaning of the particular words used, such as "payment" or "deposit," when you find that the operative provision—the condition of the mortgage—requires the mortgagor to take out of its pocket a sum of money which amounts precisely

to the six months' interest, and to pay it over to the recipient designated in the mortgage, being the mortgagee's bank, and is followed by a provision that if the mortgagor do not make that payment he shall be in default under that mortgage, and that such default shall accomplish the result of "condition broken," and call for entry by the mortgagee, and a taking by the mortgagee of the rents and profits (it being indisputably a mortgage in which, by the understanding and agreement of the parties, possession of the property and enjoyment of the rents and profits is to remain with the mortgagor until default made), there can be no escape from the conclusion that the practical act of the mortgagors parting with that money, and paying it over to the designated recipient, is a discharge of that mortgage *quo ad hoc.*

Again: In answer to the assertion of our adversaries, that the payment made to the Bank of Tennessee would not be a discharge to the Railroad Company, because it is, as they say, only a deposit in the bank, and that if the bank were to fail, the Railroad Company would be held liable to pay it a second time.

Supposing the State to remain in good credit, punctually paying all its obligations, as was the case when this statute was passed and for many years afterwards, of course the State bondholders would have gotten their interest from the State, and it would not be for them to call upon the company to pay the money a second time; or, supposing this idea of the State bondholders having a lien or right under this mortgage, to be discarded or placed where the decision of the Circuit Court places it.

And supposing that in either of the cases above suggested, or under any other circumstances that may be imagined, the State undertakes to make the company pay the amount of the interest a second time, after it has been once paid to the Bank of Tennessee *and there lost.*

How could the State possibly accomplish any such purpose?

It certainly could not be done by means of the appointment of a statutory Receiver by the Governor under the fifth

section, because the condition precedent of such an appointment would be wanting. Instead of the company having "failed" to do what that section requires of it, it would have fulfilled the requirement.

Suppose, then, the State, through its Attorney-general, files a bill in equity against the company, to compel it to make the payment a second time, and asks for a Court Receiver to make the collection.

For supporting the principle of such a bill in equity, our adversaries, if we understand correctly their views, would say that, although there is no provision in this mortgage for any other remedy in case of non-payment of interest, than this statutory remedy of entry by the mortgagee himself, by his bailiff, yet the insertion of the provision for that remedy does not necessarily exclude resort to another remedy to be sought through the Courts.

Answering that, we would say, in the first place, under this mortgage, which carries all through it the idea that it was to be executed and enforced by the State itself, without calling in the aid of any Court, just as it was made by the the State itself by its own act, without calling the aid of any conveyancer to draw the mortgage, it is extravagant to suppose that it was designed to leave open a remedy, to be enforced through a Court, for non-fulfillment of the mortgagor's obligation in respect of the interest, when we find this adequate and complete remedy by the State's own act merely, provided by the mortgage itself.

But, putting aside this objection, and considering the case made by such a supposed bill upon the merits of the claim, let us suppose that the State of Tennessee, through its Attorney-General, under the circumstances supposed, should file a bill in a Court of Equity, stating truly the facts, viz.: that under the statute this Railroad Company had done precisely what the statute said it should do, deposited the amount of its interest in the State's bank, the recipient of it designated in the mortgage—*a bank wholly owned and controlled by the State, and for the performance of whose engage-*

ments the State had pledged its faith to all who might deal with the bank; but that some of the officers of that bank (say the cashier appointed by the State itself) had run away with the money; and by the bill, he had thereupon required the Railroad Company to pay that money over again, and asked that in default of such payment the Railroad should be placed in the hands of a Receiver—can any one seriously doubt that if a demurrer were interposed to such a bill, the bill would have been dismissed, and the claim made by it regarded as not only unfounded but absurd?

And even if there were eliminated from the case, the special circumstance that the bank in which the deposit had been made was owned by the State, and that the State was responsible for its engagement, and the defaulter who had carried off the money was the State's appointee, there would still be the insuperable difficulty, that the bill would not show any default in the performance of the condition of the mortgage, but, on the contrary, would show that, in respect of the six months' interest in question, the mortgagor had completely met and satisfied the condition of the mortgage by paying over the amount of the interest in the precise manner called for by the mortgage.

If there had been an agent designated by the mortgagee to receive the payment in question, for whose acts *in general* the mortgagee was not responsible, the mere designation by the contract of such agent to be the recipient of the money coming from the mortgagor, followed by the declaration of default, and provision for re-entry, as for condition broken, in case of failure of the mortgagor to make that payment to that designated agent, would clearly, when the mortgagor had made the payment accordingly, accomplish a complete discharge to him for the amount so paid.

PRACTICAL CONSTRUCTION by the State, the Railroad Companies and the bank, OF THE PROVISIONS OF THE FIFTH SECTION requiring the Railroad Companies to pay to the bank the amounts of semi-annual interest.

There is no possibility of dispute upon the question as to what was the *practical construction* by the State, the Rail-

road Companies and the bank of the nature and effect of the Railroad Company's semi-annual interest payments to the bank under the fifth section, nor as to whose agent the bank was by all the parties regarded as being—and, in fact, acted—in making the payments of interest to the bondholders.

So long as the Bank of Tennessee continued in operation, and the Railroad Companies continued to pay interest, up to the time of the war, the State furnished to the bank statements of the amounts of semi-annual interest due to it by the respective companies, and the companies paid and the bank received these amounts as being payments of so much due to the State, *and the bank passed the amounts thus paid to the credit of the State*, just as it did its receipts of the State's revenues, or other moneys belonging to the State. The bank, as the State's fiscal agent, paid, through its correspondent bank in New York, the semi annual interest upon *all the State bonds*, as well as those which had been issued to railroad companies under the Internal Improvement Act, as those which had been issued for the State's own purposes, without any discrimination whatever as between the bonds of the different classes, or issued for particular purposes or to particular railroads, and *the bank charged to the State the whole amount of interest thus paid as being so much paid for the State's account*, and returned to the State *en masse* the paid coupons, without any discrimination. In making the actual interest payments to the bondholders, *the bank not only did not act, nor undertake to act, as the agent of the Railroad Companies, but it would have been impossible for it to do so, for neither it nor its correspondent bank knew or had any means of knowing which of the bonds, out of the mass upon which it was paying the interest, had been issued to the Railroad Companies*, and neither the bonds or their coupons showed anything whatever upon that subject. No memorandum or statement of the numbers, or any other designation of the particular bonds which had been issued to particular railroad companies, was ever furnished to the bank.

The clear evidence to the above effect will be found in the record in the testimony of *H. L. Claiborne*, p. 1069 to 1072, and exhibits, pp. 1073 to 1075, and testimony of *G. W.*

Leay, pp. 1078–1079. There was no attempt at contradiction, and, finally, the facts as above stated were in substantial effect admitted by stipulation. See Record, Vol. 3, pages 1194 to 1198.

State not bound to continue the bank as recipient as its agent of the interest due from Railroad Companies, but *might at any time require payment to be made directly to itself*, and from and after 1861 it did so.

But it is to be observed that the State was not at all bound to continue the bank as its agent for receiving those interest payments from the Railroad Companies. The fiscal agency of the bank was purely for the State's convenience, and discontinuable at its pleasure, and the appellants' brief states (page 44) that "for many years the public authorities of Tennessee had been considering the advisability of abolishing the Bank of Tennessee."

The *substance of the bargain* made between the State and the Railroad Companies to which it loaned its bonds, and which was designed to be set forth in the fifth section of the Internal Improvement Act, *was that the companies should pay the amount of the interest to the State fifteen days before the interest would become due from the State to the bonholders.* The companies were not at all liable upon the bonds, and had no interest in the State's continuing any particular agency or machinery, either for collecting from them the interest payments upon their indebtedness for the loan of the bonds, or for the payment of the interest due by the State to its bondholders. In case of dissolution of the bank or discontinuance of its fiscal agency for the State, or if for any cause it should be deemed expedient so to do, it was competent for the State, irrespective of the powers reserved to it by the twelfth section of the Internal Improvement Act, to require the companies to make their interest payments at the time agreed upon, viz., fifteen days before maturity of the State's interest, either to some other agent whom the State might see fit to designate, or directly into the State Treasury.

If any doubt could otherwise be possibly raised upon this point, that doubt would certainly be set at rest by the

twelfth section of the act, whereby "the State of Tennsssee expressly reserves the right to enact by the Legislature thereof hereafter such laws as may be deemed necessary to protect the interest of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of the act."

In 1861, the Bank of Tennessee ceased to be the State's fiscal agent, and thereupon, by the Act of July 1, 1861, the Railroad Companies were required to pay the semi-annual interest due by them directly to the State Treasurer.

Nashville and Northwestern Record, p. 2,244-5.

This was changed by the Act of January 26, 1869, so as to require the interest payments to be made to the Comptroller.

Nashville and Northwestern Record, page 2309.

Whatever our adversaries may undertake to claim as to the nature and effect of the interest payments made by the Railroad Companies to the Bank of Tennessee up to July, 1861, they must find themselves constrained to admit that, at all times subsequent to that date, the obligation of the Railroad Company was, in virtue of valid amendments of the Act of 1852, to *pay* directly to the State of Tennessee the amount of the semi-annual interest on the bonds loaned to it, fifteen days before the interest became due from the State to its bondholders.

And upon careful examination of the case, and after giving due consideration to all the criticisms and arguments of our adversaries, we submit that it is clear beyond a doubt that as well under the system of payments into the Bank of Tennessee which existed up to 1861, as under the plan of direct payments to the Treasurer or the Comptroller under the subsequent acts, the inevitable effect of the voluntary performance by the these statutory mortgagors of all the obligations imposed upon them in respect of the amounts of semi-annual interest upon the bonds loaned to them, was to place the money in the hands of the State fifteen days before any interest would become due to the bondholders, and that

thus, so far as respects the interest, *the lien of the mortgage would be completely discharged without the bondholders having received a penny.*

The effect and result of the PROCEEDINGS PROVIDED BY THE FIFTH SECTION for COMPULSORY COLLECTION OF THE INTEREST, in default of voluntary payment.

We come now to the examination and consideration in detail of that portion of the fifth section which provides proceedings for compulsory collection of the interest out of the income and profits of the mortgage premisesd in case the Railroad Company makes default in the payment required from it.

This portion of the fifth section is as follows:

"And if said company fail to deposit said interest as "aforesaid, or furnish the evidence aforesaid, *it shall be the "duty of the Comptroller to report that fact to the Governor,* "and the Governor shall immediately *appoint some suitable "person or persons* at the expense of the company, *to take "possession and control of said railroad* and all the assets "thereof, and manage the same and receive the rents, "issues, profits and dividends thereof, whose duty it shall "be *to give bond and security* to the State of Tennessee "in such penalty as the Governor may require for the "*faithful discharge of his or their duty as Receiver or Re-* "*ceivers to receive said rents, issues, profits and dividends, and* "*pay over the same under the direction of the Governor* "*towards the liquidation of such unpaid interest.* And if said "company fail or refuse to deliver up said road to the per-"son or persons so appointed by the Governor, the said "person so appointed shall report that fact to the Governor, "who shall forthwith issue his warrant, directed to the "sheriffs of the counties through which said road shall "run, commanding them to take possession of said road, "fixtures and equipments and everything pertaining thereto, "and place the said Receiver in full and complete posses-"sion of the same, and *said Receiver so appointed shall con-* "*tinue in the possession of said road,* fixtures and equipments, "and run the same and manage the entire road, *until a suf-*

" *ficient sum shall be realized*, exclusive of the costs and ex-
" penses incident to said proceedings, *to pay off and discharge*
" *the interest aforesaid due on said bonds*, which being done,
" the Receiver shall *surrender* said road and fixtures and
" equipments to said company.

" The Comptroller shall, from time to time, *settle the ac-*
" *counts with the Receiver*, and the balance shall be *deposited*
" *in the Treasury of the State.*

" The *Comprtoller is authorized* and it is *made his duty*,
" upon his warrant, *to draw from the Treasury* any sum of
" *money necessary to meet the interest on such bonds as may*
" *not be provided for by the company*, as provided for in this act,
" and the Comptroller shall report thereof to the General
" Assembly from time to time."

It is not difficult to see that, a person giving to this section a *very hasty reading*, without taking time to comprehend the various provisions, which are rather "jumbled together" in it, and whose attention had never been directed to the other sections of the act, or to the sense in which the draughtsman was accustomed to use certain words, might suppose certain language in this section to be intended to provide for the Receivers collecting income from the road for the purpose of paying interest due and in arrear to holders of the State's bonds, and applying the money thus collected to making payments to the bondholders, but such idea could only be entertained as the result of a *very hasty and careless* reading. A very moderate degree of care in the reading, with a very slight amount of reflection, must inevitably dispel any such notion.

After reading and understanding the section, no one can fail to perceive, as a point entirely free from doubt, that no payment by the Receiver to the holders of State bonds is provided for, and that no such idea was at all in the mind the draughtsman; that the sole object of the Receivership is to collect the interest due from the company to the State upon the loan of its bonds, and that the entire net income of the road realized by the Receivership is to be paid by the Receiver into the Treasury of the State, and that the payment of the interest due from the State to its bondhold-

ers is completely provided for in an entirely different manner.

It must be recollected that upon the bond the State, and the State alone, was liable to pay the interest to the bondholder, and that there was nothing on the face of the bonds to indicate that they had ever been loaned to the Railroad Company, or that such company had anything whatever to do with paying the interest on them, or that these bonds differed in any respect from ordinary obligations, pure and simple, of the State, resting merely upon its faith and credit for payment. It was not designed, and never could have been designed, when this act was passed, that if a railroad company should fail to pay the amount of interest which it owed to the State upon the State bonds which had been loaned to it, the State should go to protest upon its obligations. This section must be read in the light of the fact, which the ingenuity of counsel cannot obscure, that the State of Tennessee, when it issued these bonds, and plighted its faith for the punctual payment of the interest (the State being then in high credit, never having defaulted, and its bonds being at a premium), anticipated as of course that the interest must and should be paid at maturity; that no dishonor of the State's name should ever be permitted.

That would be the inference, naturally and necessarily, even if we did not find in the section itself an operative provision for securing that result. But we do find that operative provision expressed in the clearest and fullest terms in the latter clause of the section, as follows:

The Comptroller is authorized, and it is made his duty, upon his warrant, *to draw from the treasury* any sum of money necessary to *meet the interest* on such bonds as may not be provided for by the company, as provided for in this act; and the Comptroller shall report thereof to the General Assembly from time to time.

Here we find a provision operating as an appropriation. *The Comptroller is to draw his warrant upon the treasury*, that is, *upon the general funds of the State in its treasury.* The completeness of that provision is only pretended to be denied upon the absurd assumption, that in case one of these Rail-

road Companies should, at a given time, make default in the payment of a semi-annual instalment of interest on its bonds (probably no one of these companies having loaned to it more than two or three millions of bonds, so that the semi-annual interest would not be more than sixty or ninety thousand dollars), the State of Tennessee, such as she then was, having, besides her general assets and her general credit, a bank, of which she was the owner, with a capital of five millions of dollars, would have neither funds enough nor credit enough to make payment of such an amount of interest when it fell due. Outside of a count, surely our learned adversaries would not say they had the least idea that any such thought was, as matter of fact, in the mind of the Tennessee Legislature of 1852. Moreover, when the State of Tennessee was providing for the creation of State debts, which might amount to anywhere from ten to twenty millions of dollars, upon bonds payable to bearer, to be sold in the general market, what could have been more preposterous than to put into the frame of the act under which the bonds were to be issued, an implication, or suggestion even, that upon the contingency of the interest upon some comparatively small proportion of those bonds failing to be provided for by the company, to whom they were loaned, the State might or probably would go to protest.

The Court will note that the words of the latter clause of the section are, that the Comptroller shall draw from the general funds of the treasury the sum necessary to *meet* the interest which the company shall have failed to provide for.

"To meet," as here used, of course means to pay at maturity.

It will be recollected that the default of the company to make payment of the interest, so as to put the State in funds for making payment of the interest to its own bondholders, would occur fifteen days before the interest became due, and the Comptroller would certainly have notice of it, as upon him was charged the duty of reporting the default to the Governor.

There is no room for dispute as to what is the meaning of the word "*meet*," when used in such a connection as this. A merchant *meets* his obligations when he pays them at maturity. The same may be said of a banker, or of any

one else who creates negotiable obligations of such character as to rank among commercial securities.

No one would say that the maker of such an obligation would *meet* it, if, when it fell due, instead of paying it, he left it unpaid, and set some machinery at work to get the money out of somebody else at some future period, in the meanwhile letting his creditors wait for the money until he should be able to obtain it from some secondary source. There is not anywhere in this section a glimpse of such an idea.

And unquestionably we must read the other language of this section in the light of the fact that the interest due on the bonds themselves will have been punctually paid by the Comptroller's warrant on the State's Treasury, in pursuance of the mandate of the latter clause of the section, notwithstanding the failure of the Railroad Company to make the payment due from it to the State.

But whether the Comptroller shall have actually done so or not, we do not find in this section anything which *either requires or permits* the Receiver to make any payment to the State bondholders out of the moneys collected by him from the income of the road.

The argument of the appellants' counsel undertakes to make out such a direction to the Receiver from the provision of the earlier part of the section that the Receiver shall give bond and security for the faithful discharge of his duty as Receiver, to receive the income and pay it over under the direction of the Governor "*towards the liquidation of such unpaid interest.*"

It is to be observed in the first place, that if the Comptroller shall have performed the duty imposed upon him by the last clause of the section, by punctually paying by warrant on the Treasurer the interest due to the State bondholders when it fell due, *as it was the manifest contemplation of the act that he should do*, these words, "towards the liquidation of *such unpaid interest*," cannot *possibly* refer to unpaid

interest on the bonds themselves, for there would be no such unpaid interest.

And we thence ascertain with entire certainty, that the words "*such* unpaid interest" (*i. e.*, such interest in respect of which the company has made default, and which is to be collected out of the mortgaged premises), refer to *interest due from the company to the State.* And this is the natural and proper mode of describing it in such a connection as this. It is *the interest due and unpaid from this mortgagor to this mortgagee.*

And if we once ascertain with *certainty,* as we do, that this is *the sense in which the words are understood and used,* when we are considering the matter with reference to the *ordinary and contemplated case,* of the Comptroller having fulfilled the mandate of the latter clause of the section, the *sense and meaning of the words surely cannot be changed* by reason of the extraordinary and unanticipated event of the Comptroller's having failed to fulfill that mandate.

It is to be observed in the next place, that the words above referred to, "towards the liquidation of such unpaid interest," are *not part of the working directions* of the Receivership, but form part of the clause directing what *the condition of the Receiver's bond* shall be, and are merely *descriptive generally of the function and duties of the Receiver.*

The *working directions* to the Receiver are found in a subsequent portion of the section, and though they are precisely in harmony with *our* reading of the words in question in the prior clause relating to the bond, &c., they are radically and utterly inconsistent with the reading of those words insisted upon by our adversaries, and unquestionably if there were a conflict, the specific working directions would control the previous mere general description of the duties.

The *working directions* are, that the Receiver shall "continue in the possession of said road, fixtures and equipments, and *run the same, and manage the entire road, until* a *sufficient*

sum shall be realized (exclusive of expenses, &c.), to *pay off and discharge the interest aforesaid due on said bonds,*" which being done, the road shall be handed back to the company.

Then we have the working directions for the disposal of the net income obtained by the Receiver, as follows:

"*From time to time*" (while the Receiver is running and managing the road) "the Comptroller shall *settle the accounts* with the Receiver, and *the balance shall be deposited in the treasury of the State.*"

It was conceded on the oral argument in the Circuit Court that the true word here was "balances" instead of "balance," there having been, as was said, a clerical error in the enrollment of the act, but whether this be corrected or not, is immaterial, as the result is the same whether the word be "balance" or "balances." "From time to time" there was to be a settlement of accounts which would ascertain the amount of the balance in the Receiver's hands, and that balance he was in each instance to pay into the treasury.

This is the *first and only direction* to the Receiver to make any disposition of the net earnings of the road. There is no pretence of any direction to make any payments to bondholders.

Reading the previous words relating to paying over the income "toward the liquidation of such unpaid interest" as relating to "interest due and unpaid from the company to the State," we find entire harmony in the working direction to the Receiver, to pay over to the State, by depositing in its treasury, each balance of net income from time to time ascertained upon settling the Receiver's accounts of the results of operating tbe road. *That amounts precisely* to the application of the income *towards the liquidation of the unpaid interest* due to the State.

But if we are to treat the words, "towards the liquidation of the unpaid interest," as referring to interest supposed to

be due upon the bonds themselves to the State bondholders, and are to proceed upon the basis that the purpose of the Receivership and duty of the Receiver is to pay over the net income realized by him from the operation of the road to those bondholders on account of the interest due to them, it is plain that the Receiver would have no practical power of performing that duty, short of setting at defiance the positive direction that he shall pay into the State Treasury all the balances of net income "from time to time" appearing, and ascertained upon his settlements of accounts, as made or adjusted with the Comptroller. After he had once paid the money into the State Treasury, *he* certainly could not get it out again for the purpose of paying the State's debts to its bondholders, or for any purpose, or in any way.

The appellants' counsel perceiving the force of this difficulty, undertake to get out of it in their brief by an extraordinary line of argument. To our apprehension their propositions appear to be not merely fallacies, but so manifestly so, as to make it astonishing that they should advance them.

Their argument is, if we understand it, pages 188–189 of appellants' brief, that the direction that the Receiver shall deposit in the treasury the "balance" upon settlement with the Comptroller, imports that he was not to pay into the treasury the "gross receipts" of the road, but that there were to be some deductions from gross receipts, and only the balance to be paid into the treasury. (*Thus far* we certainly agree with them. No one could suppose otherwise.)

Then they argue that the deductions were to be *the operating expenses and the interest* due on the bonds, and that it was the *balance after these deductions*, that was to be from time to time paid into the treasury.

And in support of this, they say in substance, that there was no express authority to deduct the operating expenses: that the authority to do that must be taken by implication merely, and that "no greater or other authority is committed to him to pay operating expenses than to pay

interest, *not so much* indeed, for while the former is only implied, he is expressly required to pay the latter."

We respectfully submit that the *express* authority "to continue in the possession of said road, fixtures and equipments, and *run the same and manage the entire road,*" carries with it as complete authority to the Receiver to pay out of the earnings the operating expenses, as any one need desire.

And we likewise submit that the proposition, that in these periodical accounts, settled with the Comptroller from time to time, the Receiver was to deduct from the gross receipts the *operating expenses and the interest due on the bonds*, and then deposit the balance in the State Treasury, involves a mere absurdity.

If the interest was to be deducted, there never could le any balance to deposit; because the Receivership was to continue only until such time as "a sufficient sum had been realized," after deducting expenses, "to pay off and discharge the interest aforesaid due on said bonds." The moment that point was reached, the road was to be given back to the Railroad Company, and the Receivership ended.

Moreover, as a practical business arrangement, a plan by which the Receiver, from time to time, as he realized sums of net income of the road, which would suffice to pay small dividends upon account of the interest (supposed by the argument of our adversaries to be) due upon the State bonds to the bondholders, should undertake to make small fractional payments upon the dishonored coupons, and for that purpose call upon the coupon holders to present their coupons to him aud receive these payments on account, he being in Tennessee, and the coupons being payable in New York, and the bondbolders presumptively scattered over the country and in Europe, would haye been a very cumbrous and unwise arrangement, and more especially so, as there would be no method of indicating to bondholders or coupon holders that these were the coupons on which the fractional payments were to be made, except by publishing the list of the numbers borne by the bonds, as there was

nothing on the bonds indicating to their holder for what purpose they had been issued. It is impossible for any one really to suppose that such a performance as this, by the Receiver of a Tennessee railroad, appointed under the fifth section of the act, was ever in the contemplation of the Legislature.

On page 199 of the appellants' argument, they take aid and comfort to themselves from the proposition, that the provision of the fifth section, which directs the Receiver to pay into the State Treasury the balances of net income which the periodical settlements of his accounts should, from time to time, show to be in his hands, calls the operation a "deposit in the treasury, and this they insist is very different from a direction to "pay" the balance to the State.

And as to this they say "he is not to pay it into and mingle it with the money of the State, but to deposit it with the State Treasury, *as in a bank for safe keeping.*" To a proposition so extraordinary, and as it seems to us, preposterous, as this, we cannot deem it necessary to make any argument in answer.

But it does seem to us that this use of the word "deposit," where unquestionably it means the same thing as "pay" into the treasury, furnishes a very strong argument against the position which the appellants take in relation to the word "deposit," where it is used in the statute with reference to the payments required to be made by the companies to the Bank of Tennessee.

We have before shown, that *upon the supposition that the Comptroller shall have paid the* interest to the State bondholders when it fell due, *according to the mandate of the last clause of the section*, the State bondholders, even if all their pretensions as to their alleged rights were conceded, could have no possible claim to this money; but it would, unquestionably, belong to the State as its property, beneficially, equitably, and in every way. And yet, when this section directs the payment into the State's treasury of the money thus unquestionably belonging to it, it speaks of the payment as a "deposit;" thus showing as in the second sec-

tion of the bridge statute of February 4, 1854, that in such connection these lawmakers use the words "deposit" and "payment" indiscriminately.

Again: The careful examination of this fifth section affords additional aid for determining the meaning of the words "payment of the said bonds," or "payment of the interest on said bonds," as used for the purposes of this act in the third and fourth sections, by exhibiting the inevitable meaning and construction of the nearly corresponding words in the fifth section: "*to pay off and discharge the interest as aforesaid due on said bonds.*"

These words, it will be recollected, are used in defining the period up to which the Receivership is to continue. It is: "Until a sufficient sum shall be realized to pay off and discharge the interest as aforesaid due on said bonds."

It is very certain that the words, "the interest as aforesaid due on said bonds," as they are here used, do not refer to *interest due on the bonds themselves to the State bondholders*, because if that were so, the interest as to which the company is in default, having been punctually paid to the State bondholders by the Comptroller's warrant, the Receivership would come to a very speedy end, and without at all accomplishing its purpose.

There can be no doubt as to what is here meant by the phrase "the interest due on said bonds." It is *interest due to the State on the amount of the bonds*. It means here in analogy to what is meant everywhere else in the expressions used in this statutory mortgage in relation to the rights and relations of the parties to it, *the interest due on the bonds from this mortgagor to this mortgagee*.

We have now examined completely, we believe, the fifth section. We find that the remedy there provided for the collection of the six months' interest has run its course—*the six months' interest has been collected by the mortgagee from the rents and profits of the mortgaged estate, and the interest is in the State Treasury*. That is the net result accomplished by the operative provisions of this mortgage, which, the appellants say, is a *direct* mortgage *to them* from the Railroad

Company. We have previously shown that. if the companies pay the interest voluntarily, there is nothing that they can lay their hands on. We have now shown that if it is collected from the company compulsorily, it goes where they cannot lay their hands on it, unless the State chooses to pay them. In all this, there is no wrong done them, for it simply leaves them where the provision of their contract left them—with the promise of the State of Tennessee to pay them their interest, for the payment of which it pledged its faith and credit. To that, the bondholders consented to look, and they can look nowhere else.

It is true that the statute has directed the State official to pay the interest to the bondholder *as the State's debt and out of the State's general funds in its treasury*, but *that* does not in the least affect the question at issue. No one disputes that the State of Tennesee is bound and liable to these plaintiffs for the amount of interest, which they are now seeking to compel these railroad companies to pay to them, because the State either will not or cannot pay it.

The question is *not* as to the State's duty and obligation to pay the interest, which, in any case, is indisputable, but as to the supposed holding by the State bondholder of this statutory mortgage lien *for securing to him the payment of such interest by the company*, and it is sufficient for the purpose of the determination of the legal question of construction which is here involved, to ascertain, as we clearly do, that upon the complete voluntary performance, or complete compulsory enforcement, of the mortgage lien, provided in respect of this interest, nothing is hereby acquired by the State bondholder, but all the fruits of it pass into the State Treasury.

THE PROVISIONS OF THE STATUTORY MORTGAGE IN RELATION TO PAYMENT OF THE PRINCIPAL OF THE MORTGAGE DEBT.

We come now to the examination and careful consideration of the provisions of this statutory mortgage, which *de-*

clare in detail the obligations of the railroad companies for payment of the PRINCIPAL of the indebtedness which the mortgage is made to secure, and provide the remedies for collection of such principal on default of voluntary payment.

We propose to do this elaborately, because we conceive that the *result* necessarily reached is *absolutely free from doubt* and is *completely decisive* against the complainants' claim.

The great substantial point upon which the parties are at issue is:

To whom is the principal of the mortgage debt required, by the terms and conditions of the mortgage, to be paid by the company? and for answering that question there must, first, be answered the other—

What is the indebtedness due from the company and secured by the mortgage upon its property?

Is it *an indebtedness to the State*—the mortgagee—for the *amount of the bonds borrowed from it*, as we contend, or is it *an indebtedness to the holders of the bonds*, who are not the mortgagees, and for the respective amounts of their bonds, as the complainants contend?

As a preliminary step in the discussion of this question, we deem it proper to state, first, our view of the legal relations of the three parties concerned in the transaction, the State, the companies, and the holders of the State bonds; and then the view of those relations which is asserted by our adversaries, if we correctly understand them.

Our view is as follows:

1. *Between the Railroad Company and the State there is the relation of borrower and lender of negotiable securities, payable to bearer—the equivalent of money.*

2. *Between the Railroad Company and the persons who become holders of these securities* (by means of sales made by the Railroad Company in open market through a broker, the buyer never hearing of the Railroad Company, and the Railroad Company never hearing of the buyer,

but they meeting and dealing as unknown principals through a broker), *the relation is that of seller and buyer of a security payable to bearer, and it is nothing else.* There is *no relation of borrower and lender at all.*

3. *Between the State and the holder of these bonds* there is the *relation of borrower and lender of money;* and in legal effect, unquestionably, each successive holder becomes, by subtitution for the original holder, the lender to the State. The State is the borrower. The first taker of the bond is the lender, and each subsequent taker becomes, by substitution for the first, the lender, with precisely like legal effect as if he had been the first taker.

In determining the rights and relations of the parties to this transaction it makes no manner of difference whether the State sells it own bonds, through a broker or otherwise, and lends the money to the company, or whether it lends the bonds to the company, and the company itself sells them.

4. Between the Railroad Company and the State bondholder there is no relation at all.

On the other hand, the view asserted by our adversaries (as we understand it) is as follows:

1. Although, in form, the State appears as sole debtor on the bonds, the Railroad Company, in virtue of the conditions of this statutory mortgage, is the real primary debtor upon them to the bondholders, and is bound to them respectively for their payment, precisely as if the company were in form the obligor upon the bonds.

2. The State's real relation is that of surety or guarantor for the performance by the company of its obligation to the bondholder for making the payment to him, and in legal effect the relation of the State is precisely what it would be if it were in form the guarantor or endorser upon the company's bond.

3. In legal effect, the money is loaned by the bondholder to the Railroad Company, under its obligation of repayment, guaranteed by the State.

And—*whether the complainants choose so to claim or not*—it *follows as an inevitable consequence*, if the above stated propositions on their side are tenable, that

4. There is *no indebtedness from the Railroad Company to the State* created by the transaction.

Certainly, where a note is negotiated with an accommodation endorser, there is no debt from the matter to the endorser while the note is running to maturity and is outstanding in the hands of the holder.

In such a case there is but one indebtedness of the maker, and that is to the holder of the note.

And so here, according to the complainants' version of the transaction, there is but one indebtedness of the Railroad Company as the real borrower of the money, and that is to the holder of the State bonds (except that, of course, that debt is divided between as many separate creditors as there are separate bonds).

Now, in discussing the question, to whom is the mortgage indebtedness, due upon the loan of a given amount of bonds by the State to a Railroad Company, under the act in question, it may surely be premised, without fear of contradiction, that the sum total of the indebtedness of the Railroad Company created by the transaction, is neither more or less than the amount of the loaned bonds, and that the debt thus created is to either one party or the other, and cannot be to both.

For illustration: If the East Tennessee, Virginia and Georgia Railroad Company borrows fifteen hundred State bonds for $1,000 each under this act, it thereby incurs, upon our version of the transaction *an indebtedness in gross* to the State for the $1,500,000, and the interest upon it. And if

so, it certainly incurs no indebtedness to the State bondholders for the amount of their bonds.

On the other hand, upon the complainants' version of the transaction, there are fifteen hundred separate and distinct debts of one thousand dollars each due from the Railroad Company, to the holders respectively of the fifteen hundred bonds. And, if that be so, there could certainly be no indebtedness from the Railroad Company to the State for the gross sum of $1,500,000 as for loan of the bonds.

In the case supposed, the position of the State, as a surety merely, would be substantially like that of an accommodation endorser or guaranter of a note or bond, upon which the holder was the creditor.

Pursuing the illustration of the supposed loan of $1,500,000 of State bonds to The East Tennessee, Virginia and Georgia Railroad Company, the bondholders certainly loan the money for the term of forty years that the bonds have to run, and the State unquestionably contracts to pay to them the $1,500,000, at the end of the forty years, with the interest in the mean time semi-annually.

When we axamine this statutory mortgage for the purpose of ascertaining *when* the Railroad Company by its terms and conditions *becomes bound to repay the principal* of the $1,500,000 loan in bonds which it receives, we find it *by no means concurrent* with the time at which the loan is payable to the *lenders of the money*, but, on the contrary, the company is required to make payments of principal to the State in reimbursement of the loan of bonds long before any payments become due upon the bonds to the lenders of the money.

The *general plan and scheme* of the statute unquestionably is, that the *company shall reimburse the State for the loan of the bonds*, by means of *annual installments* to be paid by it to the State, and *credited by the State to it on account of its indebtedness*, which payments are to go into a *sinking fund established by the State for the liquidation of its indebtedness to the bond-*

holders upon the bonds, and that these payments by instalments to the State upon account of the company's debt, shall be so arranged as that their amount, with the accumulations of interest upon them, will about or nearly pay and satisfy to the State the amount of the company's indebtedness, by or before *the maturity of the bonds*, so that, when the time arrives for the payment to the creditor, *the State in making payment of its bonds will be paying them as its own proper debt*, without any right of recourse over against the company; and that if, at the maturity of the State bonds, there shall be any balance of the company's indebtedness, not extinguished by means of such annual installments previously paid, the company shall be obligated to pay at that time, to the State, such balance of its debt, and if it fail to do so, the State shall be entitled to collect such balance by foreclosure and sale under decree of a Court of Equity, according to the usual practice in foreclosure of mortgages.

THE COMPANY'S PAYMENTS TO THE STATE OF INSTALMENTS ON ACCOUNT OF PRINCIPAL OF THE DEBT

which, for *convenience and brevity*, we call

SINKING FUND PAYMENTS,

inasmuch as they went into the STATE'S SINKING FUND.

Arrangement of Sinking Fund under original Act of 1852.

The original arrangement of these sinking fund payments, under the Internal Improvement Act of February 11, 1852, was, that the company should pay to the State, on account of the principal, *annual instalments of one per cent.* on the amount of bonds originally loaned, *commencing* such payments *five years after completion of the road.* And such payments were to be made, not in money, but in Tennessee State bonds (of any class) at par.

In order to constitute the sinking fund as one *accumulating on the "compound interest" principle*, the company, by the plan of the original arrangement, was to keep on paying

semi-annual interest on the whole original amount of the debt, and would, of course, be entitled to the accumulations of interest on the annual instalments of principal paid.

And by the provisions of the *original* act, if the company made default in the sinking fund payments, the State was to collect them out of the income and profits of the mortgaged premises by the process of sequestration and receivership.

The bonds had forty years to run from their date.

The calculation annexed to this brief shows that annual payments upon a debt, at the rate of one per cent. upon the original principal, when accumulated with compound interest, at the rate of six per cent. per annum, will extinguish the original indebtedness in *thirty-three years and two months.*

The State was not restricted for the future, to the *precise adjustment of the* amount or terms and conditions of the sinking fund payments, or to the remedies for their collection which were prescribed by the original act.

By the twelfth section of that act, as has been before stated, the State had reserved to itself the right to enact by its Legislature thereafter "all such laws as might be deemed necessary to protect the interest of the State, and to secure the State against loss in consequence of the issuance of the bonds."

In exercise of this reserved power, the State made two changes in the Sinking Fund arrangements, one by Act of 1856, and one by Act of 1860.

These acts, though quite in pursuance of the general plan and scheme of the original act, made material alterations in detail.

These changes were made while the issues of bonds on loan to the companies were going on.

The right of the State to make such modifications of the details of the original plan was not practically challenged

in any quarter, and upon the hearing of these cases in the Circuit Court we did not understand the complainants' counsel as questioning the State's authority, under its reservation of powers contained in the original twelfth section, to make these alterations in respect of the Sinking Fund.

In the published opinion of their late senior counsel, Mr. O'Conor, on page 72, these amendatory acts of February, 1856, and March, 1860, are referred to as "*modifications which related only to details not affecting any principle*," and it is said by him that they "left unchanged in substance the legislative machinery by which the system of lending the State credit was organized in 1852." It is further stated by him in the same page, that the *legislation in hostility to the bondholders began in* 1869.

In the present brief of the appellants' counsel we find suggestions that the changes made by the Acts of 1856 and 1860 are or may be operative only in respect of such of the bonds as were issued subsequently to the amendatory acts.

But it seems to us that there is nothing in this suggestion. To deny that the power "expressly reserved" in such broad and general terms by the twelfth section of the Act of 1852 was sufficiently operative and effectual to authorize *at least* such modifications of detail in respect of the Sinking Fund as are made by these two Acts of 1856 and 1860 seems to us substantially equivalent to asserting that this reserved power had no operation or effect at all.

Change in Sinking Fund arrangements by Act of 1856.

By the Act of February 21, 1856, the Sinking Fund arrangements were changed in two particulars:

1. The annual payments required were raised from one per cent. to two per cent., and they were made to commence at the end of five years from the time of issuing the bonds, instead of five years from the time of completion of the road.

2. Instead of the former remedy for collection of the payments by a receivership and sequestration of the income, a remedy was provided by suit in equity, and sale of the mortgaged premises under decree in such suit for non-payment of these Sinking Fund installments on account of the principal of the debt, in like manner as had been provided by the original act for collection of such amount of the principal as might remain due and unpaid by the company at the time when the State bonds should mature.

Change in Sinking Fund arrangements by Act of 1860.

By the Act of March 20, 1860, the Sinking Fund arrangements were further modified, as follows:

The annual payments required from the companies were raised from two per cent. to two and a half per cent., but the *cumulative or compound interest principle of the* Sinking Fund was abandoned, and it was provided that thereafter the Company should be required to pay interest only on the amount of its debt remaining due after crediting the Sinking Fund payments, and not on the original amount of the debt, as theretofore required.

It will be noticed that the rate of two and a half per cent. of the annual Sinking Fund payments, which this act provided, was the precise amount which, without any accumulation of interest, would discharge the debt in a period of forty years, which was the time of currency of the bonds. But as these payments were not to commence until five years after the issuing of the bonds, this rate of Sinking Fund payments would leave, say, twelve and a half per cent. of the Company's indebtedness still due and owing at the time when the State bonds came to maturity.

We will now consider more particularly the seventh section of the original Act of 1852, which required these Sinking Fund payments.

The section is as follows:

SEC. 7. "Be it enacted, that at the end of five years after "the completion of said road, said Company shall set apart "*one per centum per annum* upon the amount of bonds issued

" by the Company, and shall use the same in purchase of " bonds of the State of Tennessee, *which bonds the Company " shall pay into the Treasury of the State*, after assigning " them to the Governor, and *for which the Governor shall " give the Company a receipt*, and *as between the State and said " Company the bonds so paid in shall be a credit on the bonds is- " sued to the Company*. And bonds so paid in, and the inter- " est accruing thereon from time to time, shall be held and " used by the State as a Sinking Fund for the payment of " the bonds issued to the Company, and should said Com- " pany repurchase any of the bonds issued to it, they shall " be a credit as aforesaid and canceled. And should said " Company fail to comply with the provisions of this sec- " tion, it shall be proceeded against as provided in the fifth " section of this act."

We rely upon this section as being absolutely conclusive in our favor, upon the proposition which we seek to establish, and which, if established in our favor, is conclusive upon the whole case, viz.: that *there was*, and *was by the parties* to this transaction *regarded as being*, a *gross indebtedness from the Railroad Company to the State for the amount of the borrowed bonds*, and that *that was the indebtedness which the mortgage was made to secure*. We think the contention, for practical purposes, may be narrowed down to the point whether there was really an indebtedness from the Railroad Company to the State. Because, if there was, this Court certainly will not hold, that when we, having received $1,500,000 of bonds from the State of Tennessee, have thereby contracted an indebtedness to the State of that amount, and have given a mortgage to our creditors to secure the payment of $1,500,000, the true construction of our mortgage is, that it is not conditioned to pay our indebtedness to the mortgagee, but it is conditioned to pay some other indebtedness to somebody else, for which we are not liable.

Was there, or was there not, understood by these parties to be, an indebtedness from the Railroad Company to the State ?

The best proof that there was, is, that we find in this mortgage a provision that upon the amount of these bonds,

having forty years to run, we were to make these yearly payments upon account of the principal which should be credited to us by the mortgagee. That it was so provided in express terms in this statutory mortgage admits of no question. *These payments are to be made and they are to be credited by this mortgagee to us.* We never yet heard of a credit unless there was some debit upon which it was to be applied. *The mere provision that they shall credit this amount to us upon the bonds, pre-supposes an indebtedness from us to them for the bonds.* If they had nothing against us in the way of debit, there was certainly nothing upon which this credit could be applied. This single consideration has ever seemed to us entirely decisive upon the main question here in controversy, and we now, with the utmost confidence, submit to the Court that it is so.

And now let us see how the Act of March 20, 1860, treats these payments on account of principal, called sinking fund payments. It will be found that it speaks of them as payments on account of the company's indebtedness to the State in language so clear and unmistakable as to leave to our adversaries no chance for quibbles or refinements in relation to the meaning or effect.

It will be recollected that by the provisions of the original Act of 1852 the principal amount of the annual sinking fund payments was to be *receipted for* to, and was to be *credited by the State to the company*, but such credit was *not* to have the *immediate effect of reducing the periodical interest payments.* Those were still to be continued on the basis of the original amount of the borrowed bonds, but the State was left to account ultimately to the company for the interest accruing upon the principal of the annual sinking fund payment, upon account of principal.

Upon this change of plan, made in 1860, the act directed that as well the past as the future sinking fund payment, on account of principal, and *the interest up to that time accrued on past payments*, should be passed *directly or immediately* to the credit of the Railroad Company in its account with the State, *so as to relieve the company from the obligation of any longer paying interest upon that portion of the debt* which had

been extinguished by the partial payments on account of principal.

The propriety of this change is quite obvious. If it had not been made—if the companies had been required to continue paying interest upon the whole original amount of the loan, besides making the annual payments of two and a half per cent. on account of the principal, the result would have been that the Railroad Company would have paid the State, by the operation of such a sinking fund, the whole amount of the bonds, *very many years before the time when the bonds would mature* and become payable to the State creditor.

Now let us refer to the *language used by the Legislature* in enacting these changes.

The provisions for crediting upon the debt the *past* payment, *with the interest which had accumulated* upon them, is made separately, as follows:

Section one provides "That the money or other bonds that have *heretofore* or *may* be paid by cities or railroad companies in this State to the Sinking Fund Commissioners *by the first day of January*, 1860, together with the accruing *interest thereon to that date*, shall be passed *directly to the credit* of the party having so paid the same, and shall be *a release to said party for that amount on the debt due by them to the State of Tennessee*."

The *third* section raises the sinking fund payments, from and after January 1, 1860, to two and a half per cent. per annum, payable half yearly, and the *fifth* section provides that the companies may make these payments either in money or in State bonds of like character as those issued to the company, at their face or par value, and then section *seven* provides that "*the sinking fund, when paid*, in *all* " *cases* shall be *passed directly to the credit of said company* or " corporation, and be *a release to said company* or corpora- " tion *from that amount due by them to the State*. The Com- " missioner shall issue a receipt to each company or corpora- " tion for such payment, retaining a duplicate in a well- " bound book kept for that purpose."

And the *eighth* section contains the provision that in future the interest payments required from the company shall be "on the *amount of bonds unpaid*" at the time being, and *not on the original amount* of bonds issued, *as theretofore provided.*

And here again we find the Legislature unquestionably using the words "*amount of bonds unpaid,*" not in the sense of *bonds unpaid to the bondholders,* to whom, certainly, nothing was contemplated to be paid until the end of the forty years, but in the sense of *unpaid amounts of the company's debt to the State for the bonds loaned.*

From the foregoing quotations from the Act of March 20 1860, it will be perceived that that act recognizes, in the clearest and plainest manner, the true relation of the parties, and the true nature and effect of the statutory mortgage created by the original act, *in precise accordance with what we have above claimed them to be.* It plainly treats the *Railroad Company as being under a direct indebtedness in gross to the State for the amount of the bonds loaned to it, and thereby necessarily excludes the idea* of the company being under the *indebtedness to the bondholders upon the bonds themselves,* which the complainants assert as the basis of their claim.

If these provisions of the Act of 1860, were contained in the original Act of 1852, we at least cannot see, how the complainants' counsel could suppose it possible that the complainants' claim could be supported, or that there was anything in their side of the case worth the trouble of arguing or talking about.

Upon reference to the portion of the brief of the appellants' counsel relating to the Act of 1860, we think we find sufficient indications that they do not fail to perceive as clearly as we could do, the utter inconsistency of the expressions contained in that act with the maintenance of their pretensions in relation to the true nature and effect of the transaction in controversy, but whether they do so or not, is, of course, not material to our course in conducting the argument, and we refer to this portion of their brief, with

a view to answering their proposition asserted on page 363 of the brief, that if that act and its expressions bear correctly the construction which we give, it "revolutionizes" the system of the previous statutes, and can affect only that portion of the bonds here in controversy issued subsequently to that act, and not the bonds which were issued before the passage of that act.

We cite and comment upon the Act of March 20, 1860, *not merely, nor chiefly*, with reference to the direct effect of its operative provisions, although we submit in that aspect, that it was perfectly completent for the Legislature in the exercise of its reserved power under the twelfth section of the original act, to prescribe all the changes in the sinking fund arrangements, and in respect of the gradual liquidations thereby of the company's indebtedness and obligations in respect of the loan of the bonds, which it did make, and to make such changes completely operative, as well in respect of bonds previously issued as in respect of bonds issued subsequently, *as* beyond doubt *it purports*.

But besides the citation of this statute with reference to its direct operative effect, we bring it before the Court, and comment upon its language and provisions, by way of *illustration*, and for the purpose of comparison of the brief language of the original section in relation to crediting the sinking fund payments to the company, with the more lengthy expressions to the same substantial effect which are found in the Act of 1860, and as an illustration of *practical construction* of the terms and meaning of the original act, and a declaration of its true intent and meaning, which practical construction and declaration are substantially part of the original transaction, having occurred *while the issues of bonds were going on.*

This Act of 1860, certainly speaks in no uncertain terms. Nothing can be plainer or more certain than that, at that time, *before the war*, before there was any thought of default by the State of Tennessee in the payment of its obligations, and when such an idea was no more entertained than it is now entertained in respect to the public debt of the United

States or of the State of New York, and *when there was no possible motive to misconstrue the original statute*, the State of Tennessee, in making certain provisions for a practical purpose, in this Act of March 20, 1860, *enunciated its understanding of what then was the relation between the railroad companies and the State of Tennessee in respect of the bonds which had been loaned to the railroad companies under the original Act of* 1852, *and that understanding is throughout in precise accordance with our theory.*

The Act of 1860 declares, in language so plain that "he who runs may read," that by the loaning of these State bonds by the State to the Railroad Company, there was created *a direct indebtedness from the Railroad Company to the State for the amount of the bonds thus loaned*, and that the *annual sinking fund payments* required to be made by the Railroad Company were *payments to the State on account of such indebtedness, extinguishing the same pro tanto;* but this was merely an enunciation, in terms *more plainly visible to the most cursory examination*, of what was *in fact as plainly and certainly provided by the original Act of* 1852; the only difference being, that it requires *a little closer and more critical examination* of the Act of 1852 to perceive this result than is required to perceive it from the Act of 1860, which shows it *at a glance.*

The original act provides that the company shall *pay* to the State the sinking fund instalment, the Governor shall give a receipt for it, and the State shall *give credit* to the company for the amount of such payment "*upon the bonds,*" which *cannot possibly mean* that the credit is to be given *upon the bonds themselves*, because *the State* was not and would not be the holder of them, and *could not possibly give any such credit*, and must inevitably mean that the credit is to be given upon the company's indebtedness to the State for the amount of the bonds; there was to be a *credit given* by the party receiving the payment to the party making it, which necessarily pre-supposes a debt due to the party who is to give the credit from the party to whom the credit is to be given, and certainly the only such debt was the *debt to the State for the bonds* which had been loaned.

Then comes the Act of 1860, and provides that the sinking fund instalments, of changed amount, which it provides for, shall be *passed to the credit of the company, and to a release to the company for that amount on the debt due by them to the State of Tennessee.*

Now, if it is intended to be said, that *in respect* of the operation of *partial extinguishment of the debt, by crediting upon it the sinking fund payments*, the system provided for by the above stated portion of the Act of 1860, "revolutionizes" the system established by the above stated portion of the Act of 1852, we can only say in answer, that we can conceive of no proposition more baseless. We cannot argue upon it, because there is nothing to be argued about.

It is too plain for dispute that the effect of the sinking fund payment, declared by the Act of 1860, is precisely like the effect of the sinking fund payment declared by the Act of 1852, and the only difference between the two acts in this respect is, that in the later act the effect is more plainly and lucidly expressed, and the circumlocution and *inaptness* of phraseology, which is found as well in this as in divers other portions of the Act of 1852, is avoided.

But there are some further answers to be given to the assertion of our learned adversaries, that the plain declaration and effect of the Act of 1860, that the payment of the sinking fund installments by the company to the State shall discharge *pro tanto* the company's obligation, under the statutory mortgage for the payment of the principal "of the said bonds," *revolutionizes* the system in respect of the matter, which was in force under the previous statutes of Tennessee.

In addition to all that has been before said in this brief, showing that the words, "payment of the said bonds," as used in the third and fourth sections, do not mean payment of the bonds themselves to the bondholder, but do mean payment to the State of the amounts of the bonds, and that, therefore, the declaration that the effect of payment to the State of installments, on account of principal,

shall be to extinguish *pro tanto* the company's obligation, "for the payment of the said bonds," was *no new thing* introduced into the act of 1860, we here specially request *comparison in this respect* of the provision and necessary effect of the Act of 1860, whereby the payments by the State, on account of principal, necessarily extinguish *pro tanto* the company's obligation, under the conditions of the statutory mortgage, "for the payment of the said bonds," with the before mentioned "Bridge Act" of February 4, 1852, passed by the Legislature of Tennessee, just before the statute in question, which is quoted on page 49 of this brief, by which bridge act it is provided, under a statutory mortgage, substantially similar to this, and having in it the words "~~constitute a lien~~" and "for the security of the payment of the said bonds," corresponding substantially with those which the complainants here rely upon, notwithstanding which it was, in that bridge act, provided by the Legislature of Tennesse that payments, on account of principal, made by the company to the State, shall be "*passed to the credit of the company in discharge of the principal* due on *any one or more of said bonds*," although the bonds themselves would be outstanding in the hands of the holders, having many years to run before maturity. It certainly cannot be claimed that the system or effect of the Act of 1852, construed as we construe it, "revolutionizes," or is otherwise than in entire harmony with the system of this *bridge act* of February 1852.

Complainants' criticisms upon certain language used in the Seventh Section, or Sinking Fund section of the Act of 1852.

We have now to notice the criticisms which the complainants make, and the arguments they undertake to build up, upon the expression contained in the seventh section that, "as between the State and the company" the bonds so paid in "shall be a credit on the bonds issued to the company," and from the provision of that section, that the

bonds paid in, with the accruing interest thereon, shall be "held and used" by the State as a sinking fund for the payment of the bonds issued to the company, and that if the company "should re-purchase any of the bonds issued to it under the provisions of this act, they shall be a credit as aforesaid and cancelled."

We shall, of course, consider *separately* the complainants' arguments founded upon these two things, viz., the particular expression first mentioned, and the subsequen- provision.

The complainants' argument, based upon the particular words "as between the State and the company" in the seventh section, will be found in their brief, pages 213 to 217.

Their argument upon this head, though many times repeated in varying shapes, is all based upon the one idea, that the declaration that the *credit shall be*, "as between the State and the company" *necessarily imports*, that the party to whom the credit is thus given *is also liable to some third party*, and that *as between* such third party creditor and the party thus receiving credit from the State, the credit for the payment in question is *not* to apply, but the party making the payment is to remain liable to such third party creditor for the full amount, as if such payment on account were not made; and then it is said that such third party, as against whom the application of the credit is precluded, is, and can be none other than the holder of the State bonds.

If the fact were, that the party declared to be entitled to receive such eredit from the State was indebted to *both* the State and the assumed third party, we agree that the expression in question *might appear to have been* used with a view to discriminate between the two separate creditors, so as to reduce the debt due to the one and keeps intact the debt due to the other, though if, in truth, the debts owing to both were founded upon the same consideration and, so far

as the debtor was concerned, there was but one debt for the single amount, an arrangement for such discrimination and keeping the debt intact in favor of one party, though actually paid in part to the other, would be in so far incongruous and extraordinary as to require it to be made very clearly manifest that such was the idea and intent of the language used, before giving to it such construction and legal effect.

But the propositions, that the words in question *necessarily import* the existence of such debt to a third party, to be saved by means of this language from disparagement or reduction by the application of the credit, or that there is *any fair inference* that there is or must be such debt to a third party, *so as to dispense with the necessity of establishing its existence independently and apart from any such mere inference* before claiming such effect or result in respect of it, are, we submit, propositions wholly unwarantable and baseless.

And when it is claimed to base the establishment of the existence of such debt to the assumed third party, merely upon the inference undertaken to be drawn from the use of the words in question, and *in the face of a clear showing to the contrary, aliunde*, the claim may, we think, fairly be pronounced absurd.

Now, to come down to the actual case before us:

There is beyond question *a debt due from the company to the State for the amount of the borrowed bonds.* That, we suppose, the complainants' counsel, in their argument on this head, concede or assume. At all events, it would be idle to deny it. They admit that there is to be a credit given by the State, and do not apparently undertake the hopeless task of showing that the required *credit* could be given without the existence of a *debit* upon which to apply it.

But they say there is *likewise* an indebtedness from the company to them upon the bonds.

Confessedly the company is not either endorser or guarantor upon the bonds, nor has it entered into *any direct contract with the bondholders* for or in respect of the payment.

Whatever claim is made of the existence of a liability on the company's part for payment of the bonds, is made *under and through the State*, and is based *purely and simply* upon the circumstance that the company has given the statutory mortgage to the State conditioned for a payment by the company, which is called in the mortgage "payment of the bonds."

The claims of indebtedness of the company which we are considering, whether to the State or to the bondholders, are claims of indebtedness upon express contract obligation contained in the statutory mortgage.

The Company, upon receiving the loan of State bonds, to the amount, say of $1,500,000, gives by this mortgage its obligation of express contract for the payment of the $1,500,000, with the interest accruing upon it, *to some one*, and this obligatory payment is described in the mortgage as "payment of the bonds." *This obligatory payment*, and none other, is *the mortgage debt*, and its amount (exclusive of interest, which we are not here discussing) is precisely the $1,500,000, neither more nor less. A question being mooted, as to which party, the State or the State bondholders, this $1,500,000 is, by the terms and condition of the mortgage reqired to be paid to, that point must be determined or ascertained in favor of one or the other of the two parties, and that one of the two parties in whose favor the determination or ascertainment is, is, indisputably, the holder of the mortgage debt, and the sole creditor of the company in respect of the transaction or the mortgage.

Of course, the one of the parties *against* whom such determination or ascertainment of the legal effect of the obligation of the mortgage is, being excluded from any claim under the express contract, cannot possibly have any claim as upon the basis of implied contract.

Inasmuch as the company gives an express obligation of payment, *completely commensurate with the consideration which it receives in the loan of the bonds*, there is no consideration for supporting an implied contract for any further payment to any one, and there can be no such contract implied.

And it is equally clear that the express contract obligation of the statutory mortgage is to pay the *whole* of the $1,500,000, either to the one of the two parties—the State or the State bondholders—or to the other of them. No one could imagine that the obligation is in part to the one party, and in other part to the other. There is no possible basis for any such idea.

Upon the foregoing premises, after ascertaining as we have done, that by the transaction and mortgage in question, the company is indebted to the State in the $1,500,000 (amount of the assumed loan in bonds), and that the annual sinking fund payments (so adjusted as that their amount will about or nearly satisfy that debt to the State, by the time of maturity of the State bonds), are, by the terms of the mortgage, directed to be credited by the State upon that debt; we have come to an ascertainment which inevitably excludes the existence of any indebtedness from the company to the bondholders, and thus the idea that the words we are considering *were or could have been used* for the purpose of saving *such assumed indebtedness* to the bondholders from being reduced or impaired by the giving of the credit in question, is plainly shown to be entirely unfounded.

But the appellants' counsel ask: If the words "as between the State and the company" were not used in the sense and for the purpose we attribute to them, for what purpose or in what sense were they used? How otherwise could they be appropriate?

We find not the slightest difficulty in answering these questions.

The meaning and purpose of these words, and how they came to be used, are plainly apparent, and have no reference

to any such idea as the plaintiffs' counsel asserts; the idea of a liability of the company upon the bonds themselves or to their holders not being then in the mind of any one.

Here were these outstanding bonds which the company had received on loan from the State, and for the amount of which, on receiving the loan, it had become liable to the State, and had given to the State a mortgage to secure such liability.

Upon the bonds themselves, the company was *not liable to any one*. Its name did not appear in, upon or about them in any way. It was *liable for the amount of them*, but such liability was to the State, which did not hold them. It was required to make these annual sinking fund payments to the State on account of such, its liability, and when the statute was to provide for its receiving the proper credits for such payment, it was *necessary to describe, in some way, the indebtedness upon which the credits were to be given*, and the form which the draughtsman chose to adopt was, that the credit should be made "as between the State and the company upon the bonds."

Doubtless it would have been better English to say, after the fashion of the draughtsman of the Act of 1860, that the credit should be given to the company "upon account of its indebtedness to the State for the bonds," but that, by the expressions actually used, the draughtsman intended to express that idea, is too clear for doubt.

Laying out of view for the moment the idea of any supposed reference by the draughtsman to rights of State bondholders, as if that were an *impossibility*, and looking elsewhere for his possible reasons for his using the language he did, we assume that his *sole* purpose was (as even the complainants will admit was at least his *primary* purpose) to provide for *giving the proper credits* by the State to the company for the payment made on account.

Upon examining his phraseology, we find that in the latter part of his sentence he has chosen to say that the credit shall be "upon the bonds," which, *if left to stand alone*, would be somewhat inapt, and certainly could not be received *literally*, for the bonds not being held by the State, but by the bondholders, the State cannot possibly give the credit *upon the bonds themselves*. No possible construction

of the earlier part of the sentence could make these latter words strictly accurate, grammatically.

Having in mind these words, to come at the end of his sentence, the draughtsman manifestly considers that he ought *to put something at the beginning* which shall make his entire sentence express the idea, the expression of which was unquestionably his task and purpose, viz., that the credit shall *be given to the company upon its debt or liability in respect of the bonds*, which is a matter purely "*between the State and the company*," and therefore he says that the credit shall be given "upon the bonds as between the State and the company." Certainly this is a much nearer approach to accuracy of expression of the real meaning than if he had merely said that the credit should be given upon the bonds, without saying by whom, and to whom, or as between whom, leaving those things to be supplied by intendment merely, and with nothing but an expression that the credit shallbe "upon the bonds" which were held by other parties.

In speaking in this section of "*credits upon* the bonds," when the real meaning is *credits upon the debt to the State for the bonds*, there is a departure from strict grammatical accuracy *closely akin to* that which appears in the third and fourth sections, and in other parts of this and kindred statutes, as we have before pointed out, in speaking of *payments of* the bonds, when the real meaning is *payment to the State for the bonds*.

Finally, upon this point, let us suppose the draughtsman to have made *this very minute change* in the structure of the sentence, viz., substitute "and *in the account between* the State and the company" for the words "*as* between the State and the company," leaving every other part of the sentence to stand exactly as it is.

With this very slight verbal alteration, the basis upon which the plaintiffs' counsel build up their arguments on this head would *drop entirely out of sight*—be non-existent.

Yet it is clear enough that whether the draughtsman should adopt the phrase "as between" or "in the account between" in expressing the idea which was in his mind, was the merest matter of chance, and neither expression would

have any sort of reference to any supposed rights of the State bondholders.

On the other hand, if the company had been liable to the bondholders upon the bonds themselves, or for the amount of the bonds, there would have been *no possible occasion for using any words whatever* to express the idea that these payments made to the State should not be a credit upon the debts due to the bondholders, because they could not possibly operate to produce such a credit, and no one could have supposed that they would or could, or have deemed it needful or at all useful to use any words to exclude any such conclusion.

We will now consider the criticisms and arguments of the appellants' counsel in relation to those portions of the seventh section which speak of the bonds paid to the State by the company being "held and used by the State as a sinking fund for the payment of the bonds issued by the company," and in relation to the provision that if any of the particular bonds issued to the company shall be repurchased by the company they shall be canceled, while provision is not here made for the *cancellation* of other bonds paid into the sinking fund; and the reasons which the appellants' counsel assign for that discrimination, and, besides discussing the arguments advanced by the appellants in these respects, we propose to give our own views and explanations in relation to these matters.

The matters here adverted to involve considerable complexity, and require care and patience for their full and correct understanding. With the exercise of such care and patience, there will be found to be neither difficulty nor doubt.

The complainants' counsel undertake to build up an elaborate argument founded upon the circumstance that this seventh section of the Act of February 11, 1852, provides, that such of the bonds paid into the sinking fund as are a portion of the bonds issued to the particular company paying them in, shall be canceled, while in respect of all the other bonds paid in, the provision is, that the bonds and

the interest accruing thereon from time to time shall be held and used by the State as a sinking fund for the payment of the bonds issued to the company. It is urged that the difference thus made between bonds originally issued to the particular company and the other bonds paid in by it, indicates a recognition by the Legislature of the plaintiffs' doctrine, that the bonds issued to the railroads under this act are in themselves specific liens, in favor of their holders. upon the railroads, and that it was *for that reason* provided, that where bonds which had been loaned to other railroad companies should be paid in under this seventh section, they should be kept intact for the purpose of preserving such lien which is claimed to be attached to them, and that, in pursuance of the same theory, the bonds paid in which had been issued to the particular company were to be canceled because they were regarded as extinguished, and therefore there was no necessity or occasion for keeping them alive in order to preserve the supposed lien.

In answer to this argument we have to say, in the first place, that a close and critical examination of this particular portion of the seventh section, instead of tending to overthrow our position in respect to the true nature and effect of the statutory mortgage in question and to sustain the views asserted by the complainants, has a directly contrary effect, Our position is, that upon the issue and delivery of the bonds by the State to the Railroad Company, there was created a direct indebtedness from the company to the State for the amount of the bonds thus loaned ; and thus that there was a *gross amount of indebtedness* from the company to the *State* for *the amount of the bonds loaned*, and not a *separate indebtedness* from the company *to each bondholder* upon or for the amount of the bond held by him ; while the complainants' theory is, that there was, upon each bond, a separate indebtedness from the Railroad Company, for its amount, to the holder, and of course no gross or aggregate indebtedness to any one for the whole amount of the borrowed bonds ; and that, therefore, when a particular bond which had been loaned to a Railroad Company was paid in under the seventh section, the particular and separate debt to that bondholder was *ipso facto* extinguished. Now, we perceive

that in the first clause of the seventh section it is provided that the bonds paid in by a company, under this section, shall be a credit on the bonds issued to the company paying them in; that is to say, on the sum total of the indebtedness for the borrowed bonds. So that, if the East Tennessee and Georgia Railroad Company, having borrowed $1,500,000 of bonds, paid in, in a given year, $15,000 of bonds under this section, the $15,000 was to be credited on the $1,500,000; the $15,000, of course, was not to be credited upon any particular fifteen bonds which had been loaned, nor could it be imagined that it was to be credited *pro rata* upon each particular bond, so as to leave in respect of each bond, or of the company's indebtedness, ninety-nine per cent. of its amount still outstanding, with one per cent. paid.

Then, in the second clause of the seventh section, it is provided that, where a company paid in bonds, being a portion of those which had been issued to itself, they were to be canceled, but still they were to be "*a credit as aforesaid.*" If one of the fifteen bonds paid in, happened to be one of the bonds originally issued to that particular company, it was to be "credited as aforesaid," that is, upon the whole $1,500,000; whereas, if the complainants' theory were eorrect, there would be no sense nor reason in crediting that particular bond upon the whole of the $1,500,000 of bonds or upon the whole amount of all the bonds, but paying it in would have operated simply as an *extinguishment of the liability upon and for that particular bond.*

Of course, if the complainants' theory were correct, that the company's liability was to pay the particular bonds loaned to it, to the holders of such bonds, so that upon borrowing 1,500 bonds it incurred 1,500 separate debts to the 1,500 bondholders, when the company took up and returned to the State for cancellation, under this sinking fund section, one of those particular 1,500 bonds which it owed, the transaction would simply *settle itself.* The necessary effect would be that thereafter this company would owe 1,499 separate debts, of $1,000 each, to the bondholders, instead of 1,500 separate debts.

If that were the true version of the transaction there would be no sense or reason in a provision requiring that

that particular bond for $1,000 should be *credited* "as between the State and the company," or in the account between the State and the company upon the 1,500 bonds *en masse*, or upon a gross debt to the State of $1,500,000.

The plaintiffs' counsel, by their brief on page 208, appear to suppose that, by the provisions of the seventh section, where particular bonds issued to a company are repurchased by it and paid to the State, as part of one of the sinking fund installments, those particular bonds are merely to be canceled, *without being credited*, and that only the *other* bonds are to be credited "as between the State and the company" upon the bonds issued to the company.

But clearly this is a mistake of the appellants' counsel. The seventh section distinctly states that where particular bonds, which had been issued to a particular company, are by it repurchased and paid to the State, as part of a sinking fund installment, they are to be *credited on the debt in gross*, just as the other bonds are. They are to be "*credited as aforesaid* and canceled."

Now, proceeding with a more direct answer to the plaintiffs, proposition, that the provision of the seventh section for the *cancellation* of particular bonds issued to a company, when by it paid to the State as part of one of the sinking fund installments, and the omission of the direction for cancellation of the other bonds paid in at the same time, indictates that the other bonds were reserved from cancellation in order to preserve their alleged specific lien upon the railroad of the company to which they had been originally issued, we have to say:

It is quite plain that the difference which this section makes in respect of immediate cancellation, between bonds which were and bonds which were not, a part of the original issue to the company paying them in, had no reference to any purpose of preserving or not preserving a supposed mortgage lien vested in and inseparably attached to that particular bond, so as that the lien would fall upon that bond being canceled; it was *not only* bonds paid in under the seventh section, which had been loaned to railroad companies other than the particular company paying them

in, that were preserved from present cancellation: the provision was *equally applicable to bonds* which had never been issued to any railroad company, and in respect of which there could be *no idea or pretence of a lien of any kind being attached to or connected with them; e. g.*, bonds issued for stock in turnpike companies, for building the capital or for stock in the State's bank, or for other purposes of the State itself, in which no one else had any interest or concern.

We must therefore seek the reason for making the distinction which is here made, in respect of cancellation, between the bonds which had been issued to the particular company, and all other bonds, paid in by it; and we find that reason, *not in anything connected with any lien, or supposed lien,* attached to any bonds and dependent upon their continued existence, but in another and totally different practical circumstance, namely, that as to the bonds paid in under the seventh section other than the particular bonds paid in which had been issued to the company itself, the intention and express enactment of the seventh section was, that the bonds paid in and the interest accruing thereon from time to time, shall be held and used by the State as a sinking fund for the payment of the bonds issued to the company; under which provision it was necessary, in order *to give to the company the benefit,* to which it clearly was entitled, of the *interest compounded* upon the bonds other than those originally issued to itself, which should be thus paid in, that the *State should continue to collect the interest upon them,* whether they were bonds issued to other railroad companies or bonds issued for the State's own purposes, and to reinvest from time to time all such interest, thus realizing, for the purpose of the ultimate settlement of accounts between itself and the company, the benefit of compound interest upon these payments made into the sinking fund under the seventh section, according to the true theory of the old fashioned sinking fund. Plainly, under the provisions of the original act as contained in the seventh section, it was necessary that this should be done, in order to give to the company paying in the bonds to the sinking fund, long before the maturity of the indebtedness upon which they were to be credited, the benefit of this

interest and the compounding of it; because under this seventh section, the Railroad Company, notwithstanding it had made the payment on account of the principal, for which payment, by express provision of the statute, it was entitled to credit on account of the indebtedness, was still required to keep on paying the semi-annual interest upon the whole amount of the indebtedness, as if such payment on account had not been made.

If, while that exaction of interest payments upon the full amount of original indebtedness, notwithstanding partial payments upon account of it, continued to be made, there had not been made some such provision as this, for the State's collecting and reinvesting and accounting to the company for, the interest upon the bonds paid in, to constitute this credit, the Railroad Company would have been enormously the loser, and the State enormously the gainer upon the transaction. For this reason it is provided that these bonds paid in, and the interest accruing thereon from time to time, shall be "*held and used*" by the State as a sinking fund for the payment of the bonds issued to the company; by collecting and reinvesting the interest, by way of sinking fund for *the payment of the bonds issued to the company*, that is, to be *applied in or towards payment of the company's indebtedness to the State for the loaned bonds upon the final settlement of accounts between the State and the company.*

Then we find that on the 20th March, 1860, by the act then passed, the State then made an entirely different regulation for the liquidation and discharge of the company's indebtedness to the State for the borrowed bonds. The annual sinking fund payments were raised to such an extent as that it was no longer necessary to require the company to keep on paying interest upon the full original amount of bonds loaned to them. The sinking fund was placed at the rate of two-and-a-half per cent. per annum, which amount would, in forty years, without the aid of the cumulative or compound interest principle of an old-fashioned sinking fund, extinguish the indebtedness. And when this change of plan was adopted and the company was, as a natural and necessary consequence, relieved from paying the annual interest upon that portion of the original

amount of indebtedness which had been paid by means of the annual installments, and *there was no longer any necessity of keeping an interest account between the comapany and the State in respect of the amount of the annual installment paid in*, it was seen that there was no longer any occasion for keeping alive *any* of the bonds which had been paid in under the seventh section, and by this Act of 20th March, 1860, *all* the bonds paid in were directed to be presently cancelled. If the Legislature had entertained any such idea, in respect of there being *a lien attached to the particular bonds* issued to railroad companies, *making it necessary to keep the bond itself alive* in order to preserve in force the statutory lien held by the State for the amount of it, as the complainants allege, there would have been *just the same occasion* for making a distinction in respect of cancellation, between bonds of different character paid in *subsequent to the Act* of March 20, 1860, as had before existed for the reason before explained, in respect of bonds paid in under the seventh section of the original act; and the making of this change in respect of cancellation of bonds by the Act of March 20, 1860, is couclusive evidence of the meaning and understanding of the Legislature, that this difference in respect of cancellation, between bonds paid in which had been originally loaned to the particular companies and bonds which had not been so loaned, had reference merely to *the regulation of the interest account between the Railroad Company and the State*, and no reference whatever to any such supposed lien, as the complainants' counsel, some twenty years afterwards, think they have discovered.

And thus the reason appears which led to the distinction made in the seventh section in respect of bonds paid in to the State, which had been originally issued to the company paying them in.

All the bonds except those, whether issued to other railroad companies or for the State's own proper purposes, were to be kept alive, and *held and used* by the State, by way of sinking fund, *i. e.*, the State was to cut off and collect the coupons, and invest and reinvest all the interest moneys, and compound the interest on the principle of the old fashioned sinking fund, the doing of which, so long as there was continued in operation the original system of

requiring the companies to keep on paying the interest on the whole original amount of bonds, notwithstanding the partial payments on account of principal, was an absolute necessity as an act of justice to the companies, in order that they might eventually get the benefit of the compounded interest on their partial payments, as a counterbalance to their burthen of keeping on with their interest payments on the extinguished portion of their indebtedness.

No one who will take the trouble of looking into this somewhat complicated matter, sufficiently to come to a real understanding of it, can fail to perceive that this is so.

Suppose a particular railroad company in the course of its payments on account of principal, called sinking fund payments, had paid in $100,000 of bonds issued by the State for its own purposes, and the State, while it still compelled the company to keep on paying interest on the whole original amount, omitted to collect and compound, and ultimately to account to the company for, the interest upon that hundred thousand dollars of State bonds, pure and simple, which the company had paid in, the practical result would have been, when the State came to settle its accounts with the particular company, that the company would have paid for the State, at its own cost and without ever getting any reimbursement, all of the interest on this hundred thousand dollars of State bonds, issued for the State's own purposes, which the company had paid in, and the State would unjustly make a profit out of the company of the whole amount of that interest.

Where the company paid in bonds which had been originally issued to itself, it was chosen, in adjustment of the details of the sinking fund system by the seventh section of the original act, to adopt a different plan in the *regulation of the interest account*. It was provided that after crediting the *principal of those bonds* upon the *principal of the whole debt*, those bonds should be cancelled, and, of course, *their interest coupons would be destroyed*. If this company chose to make provision for the payment of the interest itself, as by the fifth section it had the *option* of doing, it would of course be relieved from the necessity of paying the interest upon

these cancelled bonds, because the interest coupons would not be in existence, and if the company paid the amount of its interest to the Bank of Tennessee for the State under the fifth section, the amount so to be paid would be reckoned by deducting from the original amount these bonds which had been "cancelled" under the seventh section, *treating them, when thus cancelled, as if they had never been issued.*

Under this regulation, the company being thus relieved from the interest on so much of the original debt which had been retired and cancelled, there would, so far as concerned the cancelled bonds, be of course no occasion for, or possible application of, the regulation of a *counterbalancing accumulation of interest* as provided with reference to the other bonds as above explained. And it was plainly for this reason, and for this reason only, that the "holding and using" as a sinking fund, which is provided for in respect of the other bonds is not provided for in respect of these bonds.

As a practical matter, the amount of bonds paid in which would consist of bonds originally issued to the company paying them in, would, in the nature of things, be but a very small proportion, upon the application of the doctrine of chances, which is practically about as safe a basis for human action as any of the natural laws. If a particular company had been the borrower of one-twentieth of all the outstanding Tennessee bonds of every class, including as well State bonds, pure and simple, as bonds loaned to railroads, and all the bonds were afloat in the market, without any discrimination made by the holders, there would be just one chance in twenty that a bond paid in by a particular company would be a bond which had been issued to itself.

It seems to us quite plain that the provision of the seventh section for "*holding and using by the State*" of the bonds paid in by the companies "as a sinking fund for the payment of the bonds issued to the companies" referred, as a practical matter, to the process we have adverted to, of collecting, reinvesting and compounding the interest on those bonds, to be ultimately applied, upon settlement of

accounts between the State and the company, toward *sinking or discharging* the debt due by the company. These reinvestments of interest, by way of compounding, would naturally be made in other Tennessee bonds (of any class), just as the payments by the companies, under the seventh section, were to be made in such bonds; and the general result of the working of the system would be to *absorb into the sinking funds held by the State* a large part of all the bonds issued by the State, and thus such bonds would be *practically* extinguished as outstanding obligations of the State. But we do not think there is any room to suppose or imagine that this act intended to provide, or that its framers had any idea, that if at any time in the future, the State should need cash to take up any bonds then maturing, which had not been absorbed into the sinking fund, such cash should practically be raised by taking out of the sinking fund and selling, some of the old bonds which had long before been absorbed into it (and which might, perchance, be over due by their tenor).

Such a performance would, we think, be quite unprecedented; and there would be no considerations of convenience or advantage of any kind to recommend it.

In such a case it would, as a practical matter, be not only quite as well, but much better, to raise the needed cash by a new issue of State bonds then made, the terms and time of maturity and rate of interest of which, would be made to suit the then condition of things.

The sinking fund system established by the seventh section of the original act, was, in its details prescribed for the regulation of the interest account, greatly and unnecessarily complicated, and with no special consideration of advantage to make up for the complication, and the Legislature appears to have become awakened to this by the time of the passage of the Act of 1860, and to have been thereby led to the adoption of the much simpler system which that act prescribes.

Upon careful examination, the provisions of that Act of 1860, will be found to be in complete harmony with, and to sustain the correctness of the somewhat elaborate views we

have above given of the nature, *true meaning and reasons* of the particular portions of the seventh section of the original, act which we have above discussed.

By the Act of 1860, the plan of requiring the company to keep on paying interest upon the original amount, notwithstanding the partial payments of principal was entirely abandoned, and the interest payments were limited by the balance of principal remaining due at the time being.

This change entirely removed the *ground and reason* (as above assigned by us) for the original provision requiring the bonds paid in, other than those which had been issued to the particular company, to be kept alive or "held and used" to the end of collecting and compounding the interest upon them, and there was no longer any reason for the discrimination made by the original seventh section, by requiring the bonds which had been paid in by the particular company to be cancelled, and all the others to be kept alive.

And it was *purely and simply because of*, and *in harmony with*, the change thus made by the Act of 1860, in the regulation of the interest account, that the Act of 1860 *entirely discarded and abolished* the provisions of the original section requiring part of the bonds paid in to be kept alive or "held and used," and the other part to be cancelled, and substituted by its tenth section the provision that they should *all be cancelled.*

And by reference to that Act of 1860 it will be found, that while by the eighth section, it gave to the companies the benefit of stopping the future interest on the amount of the partial interest payments, it carefully provided by the first section for carrying to the credit of the companies *the accumulations of interest on their past sinking fund payments*, under the process of "holding and using" prescribed by the seventh section, in conformity with the exposition we have above made of the rights of the companies and the meaning and purpose of that part of the original section.

If the reasons we have above assigned, viz., the change made in regulating the interest account, be not the true

cause and reason of the change made by the Act of 1860, in directing immediate cancellation of all the bonds paid into the sinking fund, instead of the previous system of cancelling part and keeping alive or "holding and using" the other part, what, we ask, can have been the real cause and reason of that change made by the Act of 1860? No other cause is suggested by our adversaries, and we can imagine none other.

Certainly the appellants' counsel caunot deny, that *if the reason* for the distinction made in the seventh section between the bonds paid in, by directing bonds paid in, which had been issued to the particular company paying them in to be cancelled, and all the other bonds to bept alive, *had been that which the complainamts assert*, viz., the preservation of a supposed specific lien attached to those other bonds, upon the property of railroad companies to which they had been originally issued, that reason would have been as fully and completely applicable *after* the Act of 1860 as it was *before*.

Observations of Appellant's Brief in relation to the naure and effct of Sinking Funds in general.

We find in the appellants' brief, on pages 209 to 215, an argument upon the nature and effect of sinking funds in general, and of certain particular sinking funds there adverted to, to which it does not seem to us needful or appropriate to give more than a very brief reply.

Sinking funds are of different kinds, and are established under greatly varying regulations, and little, if any, progress is made towards determining the nature and legal effect of a sinking fund of a particular character, by discussions upon another of wholly different nature and effect.

It certainly never would occur to us to question, the proposition that in the ordinary case, where a railroad or other

company makes and negotiates its bonds or other obligations, whereby it binds itself to the holder for the payment to him of a specified sum, either with or without an accompanying mortgage, and by the mortgage or otherwise constitutes for itself in any of the customary forms, a sinking fund, to be held in the hands of trustees, in order to provide for the redemption of its bonds, the sinking fund is no more than a collateral security, and in no respect disparages or impairs whatever rights or remedies the creditor would otherwise be entitled to, in virtue of the debtor's bond or obligation which he holds, or of the accompanying mortgage, if there be one. If, in such a case, the sinking fund were accumulated to an amount nearly or quite sufficient to pay off the debts, and before being actually so applied, it were lost by the defalcation of the trustees or otherwise, it would be the debtor's loss.

No defense against the creditor's claim for full payment, could possibly be founded upon any such circumstance.

No lawyer, we think, would think of questioning these propositions.

But this case, now before the court, is so utterly different from the one supposed, that it is idle to introduce in this case any argument or illustration founded upon or relating to such supposed case.

These railroad companies have not issued any bonds or obligations (except the statutory mortgage to the State of Tennessee), nor have they in any way bound themselves to, or entered into any contract with, the holders of the State bonds.

They have merely borrowed the State's bonds, the equivalent of so much money, and have converted them into money by sale, just as one re-sells an ordinary bond payable to bearer, which he has bought, and they have agreed with the State to make payment to it for the bonds so borrowed, in annual installments, running through a long term of years, while the State's bonds are running to maturity, and they have given to the State a mortgage to secure the performance of such their agreement with it, and *these are*

the only engagements, either express or implied, which the company has entered into with any one.

The State, which has borrowed the money from the bondholders, and is the sole debtor to them, *has instituted for itself* a sinking fund, in order to provide for the ultimate redemption of its debt to its bondholders, and it chooses that the payments which it receives from the company, its debtor, in the annual installments before mentioned, shall go into such its sinking fund.

The company has not established any sinking fund at all, nor has it any ownership of or control over, or anything to do with the State's sinking fund. It is merely bound to pay its installments to the State in accordance with its agreement, and when such installments shall have amounted to enough to pay its debt to the State, *there will remain incumbent upon it no obligation of any kind to any one* in respect of the transaction.

The sole contract it has entered into provides in the plainest terms that its installments as paid shall be credited upon and extinguish *pro tanto* its debt to the State, which is the only one it owes.

The decision of this Court in the Pacific Railroad Sinking Fund cases, 99 U. S. R., 725, has no possible application here, and we cannot understand why the appellants' counsel should think it worth while to bring it forward, as they do on pages 211–12 of their brief. The decision of the majority of the Court in that case is placed *expressly* upon the ground that the sinking fund payments required from the company by the act which was in question, are *not* payments upon account of the company's debt to the United States, and that "the *moneys and securities in the sinking fund,* although kept in the treasury, are *owned by the company.*" The majority of the Court held, and that was the basis of their decision, that the circumstances, that the Secretary of the Treasury was the custodian or trustee of the sinking fund, and that the debt, the ultimate redemption of which was intended to be provided for by the sinking fund, was a debt to the United States, were *mere accidental circumstances.*

That the case was to be regarded in legal effect just as

if the debt had been due to some third party, and the trustee of the sinking fund had been some third party; and that the imposition upon the company by the Government of the obligation for making and keeping up the sinking fund, was sustainable as an exercise of the Goverment's regulating power over the transactions of the company which it had created.

What help this Pacific Railroad Sinking Fund case, in which it was expressly decided that the payments made into the sinking fund were *not payments* on account of the company's debt, can give to the complainants in this case, in which it is expressly provided that such payments into or for the sinking fund *shall be* payments upon account of the company's debt, is not discernable, by us at least.

LACK OF EQUITY, UNREASONABLENESS, AND PERVERSION OF REAL INTENT AND MEANING IN THE CONSTRUCTION WHICH THE COMPLAINANTS SEEK TO GIVE TO THE SINKING FUND SECTION.

Thus far our discussion of the seventh or sinking fund section, has been conducted with reference to its particular language, and we have taken that course because it is upon that basis, and upon peculiar constructions of and nice criticisms upon particular expressions used in the section, that the complainants undertake to build up their case.

We have now to ask attention to certain broader views of the subject-matter involved in the construction of the section in question, and to an inquiry into the real plan, purpose and intent which the section was designed to carry out, and to a consideration of the reasonableness or unreasonableness, justice or injustice, of the result which the complainants seek to work out by the construction which they assert for the section in question.

It cannot, with any fairness, be questioned, that in respect

of the Railroad Company's liquidation of its indebtedness created by the loan to it of the bonds in question, the substantial plan and scheme of the parties was, that these annual payments by the company on account of principal, called sinking fund payments, should be so adjusted as that by the time of maturity of the State bonds, the amount of such payments should be about equal to sink or pay the debt, or that, at all events, the unliquidated balance should be comparatively trifling, say not over ten or fifteen per cent. or so.

For the sake of the argument, we may fairly assume that the payments would be adequate to satisfy the debt.

Assuming the amount of bonds loaned to a given company to be one million dollars, the *status* then is, that by the scheme of the bargain, the company receiving by way of "aid" in its enterprise the loan of a million dollars in bonds, binds itself to the State to pay to it the million dollars, in installments so adjusted as that the whole amount will have been paid by the time when the State bonds have to be paid by the State; and to secure its performance of this agreement, the company gives its mortgage to the State. The company on receiving the bonds, which are securities payable to bearer, converts them into money by selling them in open market through a broker, as it was expected it would do. The buyer knows not, and never hears of the company, and the circumstance of the bonds ever having passed through the company's hands leaves no trace, but on this first sale and on all subsequent sales, as the bonds pass from hand to hand, they are bought and sold simply as Tennessee State bonds.

There is nothing on their face to show that they were issued for any particular object, or otherwise than for the State's own proper purposes. They purport to be ordinary bonds of the State of Tennessee, binding the State, and it alone, for their payment, and the buyers or holders have no knowledge or information to the contrary. Their market price is always precisely the same as other Tennessee State bonds, in respect of which there is no possible security other than the faith and credit of the State.

The company completes its payments to the State by the

time agreed on. Either it pays the installments voluntarily, according to its agreement, or they are collected out of its mortgaged property or its income, in virtue of the remedial provisions of the mortgage to that end.

When the State bonds mature, the State will not, or at all events does not, pay them. Either by misfortunes it has become unable to pay them, or repudiationists have gained control of its political power, and (as is the actual case here), wilfully refuse to pay, and there is no possibility of legally coercing the sovereign State to make payment.

Under this state of things, the complainants seek, by nice verbal criticisms, to give such a construction to the company's mortgage, and especially to the provision regulating the payment of the installments of principal, as to compel the company to pay another million dollars to the holders of the State bonds, and the question is upon sustaining or not sustaining that construction.

The complainants, unable to deny that the company's payments of the million dollars to the State were made under the mortgage, that their payment was *secured by* the mortgage, and that either they have been or could have been collected by enforcement of the mortgage, and that the claim which the complainants are making is for a *double payment* by the company, seek to avoid that apparent difficulty by the rather extraordinary claim put forth in their brief at page 215, that in the event that has happened, the company has become "*an accommodation mortgagor*" to the State for the benefit of the State bondholders, and that upon that footing it, must pay to the State bondholders, or submit to have them collect out of the mortgaged premises, a second million.

Thus the claim asserted by our learned adversaries is, that when the company receives the loan of a million dollars in bonds, and gives the mortgage to secure it, the legal effect of the language used is, that the mortgage *stands in the first place* as security for *the million dollars* which the company *really owes*, and *when that has been paid* or collected under it, "*it stands as an accommodation mortgage*" *for another million*, and is to be enforced accordingly.

And for whose benefit is this alleged "accommodation mortgage" asserted and proposed to be enforced?

Is it any one who can be said to have given credit to it or to have relied upon it in any way, or who can say that unless it be thus enforced he will be disappointed of anything that he had even expected or imagined when he entered into the transaction upon which he founds his claim? Not at all. It is purposed to be enforced in favor of these State bondholders, who, *when they acquired their bonds, knew not at all of its existence.*

If, upon the mere language of the section under construction, there were (as it seems to us entirely clear there is not) any doubt of the correctness of the construction upon which the defendants rely for protection against any such claim, surely it would be the duty of the Court to strive, up to the utmost limits possibly allowable by the rules of law, to give such construction to the language as to avoid the extraordinary and unconscionable result sought by the complainants.

Questions of Construction of the Act of March 20, 1860, raised by Complainants.

We have now to notice the proposition asserted in the appellants' brief, on pages 359 to 363, that by a proper construction of the Act of March 20, 1860, bonds paid into the sinking fund, under that act, and bonds purchased for the sinking fund with moneys paid in under that act, are not permitted to be Tennessee State bonds generally, but are restricted to bonds which had been issued to the particular company making the particular payment, together with certain arguments advanced by the appellants' counsel, based upon the provisions of this act in relation to endorsed bonds, from which they seek to derive support for the primary proposition.

We may say, in the first place, that even if the complain-

ants could show the soundness of their proposition, we do not perceive how it could advance their cause.

It might show that the Act of 1860, had adopted a foolish regulation or restriction which would be inconvenient and damaging to the State, and of no substantial advantage to any one, inasmuch as the necessity of searching in the market for the particular bonds, while there was nothing on their face to distinguish them, would be apt to cause great and vexatious delays in finding investments for the sinking fund moneys, and keep such moneys lying idle for long periods, but it would not in the least relieve the complainants of the difficulty which the Act of 1860 presents, and would still present if this feature were found in it, because of its clear recognition of the fact, *absolutely fatal to the appellants' pretensions*, that upon the transaction and statutory mortgage, the indebtedness of the Railroad Company, "the mortgage debt"—is a debt "due by the company to the State of Tennessee," and therefore, necessarily, not a debt or liability to the holders of the State bonds, and that the sinking fund payments made by the company to the State of Tennessee, whether made in bonds or in money, are "*a release to said Company from that amount due by them to the State*," *i. e., from so much of the mortgage debt.*

The only difficulty we find in answering the complainants' argument for restricting the payments or investments in State bonds under the provisions of the Act of 1860, to the identical bonds which had been originally issued to the company making the particular sinking fund payment, is, that there does not appear to be any thing to answer.

The language used is, that the bonds paid in or purchased shall be of "the same character" or "the like character" as those issued to the company. That this language does not of its own natural force express any such idea, as that the bonds are to be *the identical bonds* issued to the company is certainly too plain to need discussion, and the appellants' counsel feel constrained to admit that "the natural import of the words is bonds like, *but* not *identical*."

Then they affirm, and enter into a course of argument by which they claim to show, that although the statute *says* bonds of "like character" or "same character," it really means the *identical bonds* issued to the particular company, but after carefully reading all that they say, we do not find in it any thing which shows, or in any degree tends to show, any such thing. Each proposition they assert in this regard appears to us, after carefully reading the *basis* on which it is founded, to be absolutely a *non sequitur*. Whether it is so or not, we leave it to the Court to say. We do not discuss it, because we can't see any thing to discuss, even supposing the *premises* to be correctly stated, which is not the case.

The whole basis of their arguments rests upon some supposed or alleged incongruities in relation to "endorsed bonds," to which, *as well as* to State bonds loaned, *some* of the sections of the statute relate.

If there were found any such incongruities in relation to endorsed bonds, it would probably be the result of the circumstance, of not uncommon occurrence, that the statute was originally drawn to cover State bonds only, and then some one in the Legislature interpolated an amendment so as to include also endorsed bonds, and in so doing, did not exercise sufficient care in revising all the sections, to suit the change, and thus produced seeming incongruity. Supposing this to be so, any awkwardness, incongruity or blundering in relation to endorsed bonds, would not prejudice the provisions in relation to the State bonds, as to which there is no incongruity, awkwardness or uncertainty.

But, upon careful examination we do not find any incongruity or difficulty, even in relation to the endorsed bonds.

After reading very carefully the argument of our learned adversaries on this subject, on pages 359 to 362, we must say, with all respect, and in all sincerity, that we find it much more difficult to understand *what they really do mean by what they say*, or *why* they suppose their conclusions fol-

low from their assumed premises, than we do to understand and construe the statute itself, in which really we can perceive no difficulty at all.

But we will point out certain mistakes of fact which they make, the correction of which, as it seems to us, removes the premises upon which they base their argument, such as it is.

1. They seem to suppose that the provision of the second section for canceling endorsed bonds and returning them to the company which issued them applies to endorsed bonds which may be paid in by companies *subsequent* to the passage of the act. If this were so, we cannot see that it would be of any consequence in the argument. But plainly it is *not* so. The endorsed bonds, the cancellation and return of which is provided for by the *second* section, are only those referred to in the *first* section, and *they* are only bonds which shall have been paid in "by the first day of January, 1860," which is before the passage of the act.

It could hardly be supposed that any company for whom bonds had been endorsed, had paid into the sinking fund before the passage of the act, endorsed bonds of *another company*, if they had any right to do so, which does not appear. If any such thing had happened, it was certainly a piece of stupidity in the second section, to direct such endorsed bonds to be cancelled and given up to the company which issued them, which would amount simply to the *State's making a present to that company of so much money*. It would, however, hurt no one else.

But how that piece of stupidity, if such a case in fact existed, can be supposed to have any *bearing whatever* upon the meaning of the words "like character of bonds," and "bonds of the same character," as used in the fifth and sixth sections, we cannot imagine.

The appellants' argument substantially admits that it might safely be assumed that a company for whom bonds had been endorsed if subsequent to the act, it paid in bonds for the sinking fund instead of paying in money, would pay

in only its own bonds. What they say is, "It is true that a Railroad Company for whom the State had endorsed bonds would be apt to pay in its own bonds."

But even if it should pay in the endorsed bonds of an other company, no harm would come from it. *It* would get the proper credit for the payment, and the other company, maker of the endorsed bond, would *not* get it up for nothing, as the appellants' argument supposes.

The State would keep it and collect it. There is *no* provision in the act for canceling it.

The second section, as we have shown, relates only to the cancellation of bonds, whether State bonds or endorsed bonds, paid in *up to January* 1, 1860.

The subject of canceling bonds paid in *after* January 1, 1860, is dealt with by the tenth section. That provides for canceling *State bonds.* It does *not* provide for canceling *endorsed bonds* paid in after January, 1860, nor does any other section.

Then on pages 361 and 362 of the appellants' argument is a very long statement of a supposed case of two companies for whom bonds have been endorsed, and the Sinking Fund Commissioners taking the sinking fund money paid in by one of them, and buying up with it endorsed bonds of the other, and then canceling such bonds and surrendering them to the company issuing them, without its having paid anything for them, from all which it is said very absurd and unjust results would follow.

To which elaborate illustration of "how the act would work," unless the complainants' construction of the words in question be adopted, we give this short and complete answer. *The case supposed could never happen.* The act gives *no authority whatever* to the Sinking Fund Commissioners to make investments by *buying up endorsed bonds.* By the sixth section, all their investments are to be made *in the bonds of the State.*

It is not material to any present purpose to ascertain with accuracy to what precise *points of character* of bonds the act referred in calling for bonds of "like" or "the "same character. It is sufficient that we see clearly that the words plainly *do not* refer to the "identical bonds."

If we were to take up time in going further to examine this, it would be rather as a moot question. So pursuing it, our idea at first glance would be, that where State bonds were issued State bonds must be paid in, and where endorsed bonds were issued, endorsed bonds must be paid in.

And probably, in paying in, or buying for investment of the sinking fund, State bonds, there should be conformity in the rate of interest, there being both five per cent. and six per cent. State bonds.

Effect of enforcement of the legal remedies under the Statutory Mortgage for collection of the Sinking Fund installments.

We now come to the consideration of the effect and result of the enforcement of the legal remedies provided by the statutory mortgage for the collection of the payments on account of principal, or what are called sinking fund payments, and we submit to the Court, with entire confidence, that the ascertainment of these results is clear and unquestionable, and is of itself and alone completely decisive of the case against the complainants.

Suppose the company neglects or refuses to pay the annual installment on account of the principal of its indebtedness to the State, and the State thereupon proceeds to collect such installment of principal in the mode provided by the original act, namely, by entering upon the company's property, and sequestrating its revenues through a Receivership, according to the seventh and fifth sections of the Act of 1852, and thereby collecting from the company's property an amount sufficient to pay, and so actually paying to itself the annual installment upon account of the principal of the company's indebtedness to it, and suppose that in *each and every year*, commencing with the expiration of five years from the completion of the road and continuing until the expiration of the forty years which the State bonds have to run, *the same operation is repeated*, of refusal or ne-

glect by the company to pay the installment of principal due from it, and the collection of such installment by the State through the Receivership and sequestration, until by the end of the period of say thirty-three or thirty-four years, or thereabouts, during which this operation goes on, the State has, by means of these processes, collected the whole amount, or nearly the whole amount of the principal of the company's indebtedness to it for the bonds loaned.

We find indisputably this result: that these sums of money have been collected by proceedings *in invitum* out of the company's property. How has it been done? It certainly has been done; this mortgagee has got the money, and it has come out of the rents and profits of the mortgaged property. How has it been collected? There can be no dispute about that. *The mortgage, has got the money by enforcing the remedies provided by the mortgage for a breach of its condition.* He has not got it in any other way. The company agrees to pay certain sums of money; that is part of the condition of the mortgage; it does not pay them; and thereupon the mortgagee enters upon the mortgaged premises, and collects them out of the rents and profits. Now, *if this does not show that the condition of this mortgage is to pay those sums,* we would ask what it does show? Our learned friends say, or will say, that these sums are not any part of the principal and interest of the bonds, but that they are some independent sums which the company agreed to pay by way of making an ultimate provision for its own benefit, and that the mortgage was not conditioned for, and was not made to secure such secondary provision. Certainly the *mortgage was made, and was expressly declared* at the outset *to be,* for *securing the principal of these bonds, and for nothing else, neither more nor less* (of course, we are here considering the question as to principal separately from that of to interest, which is elsewhere discussed).

If these sums, these annual sums, which, at the end of the term, amount to very nearly the amount of the principal, *are not a part of the principal sum for the securing of which this mortgage was made, how is it that they come under the security of the mortgage, and have been collected by its enforcement?*

To this question there can be but one answer possible.

These annual installments *are* part of the principal of the mortgage debt.

Now we take one step further:

By the amendment of the Internal Improvement Act made by the statute of February 21, 1856 (Nashville and Northwestern Record, p. 2200–2201), it was provided as follows:

§ 5. Raises the sinking fund payments to two per cent. per annum.

"SEC. 6. Be it further enacted that should any of said "Railroad Companies fail or refuse to comply with the pro- "visions of the fifth section of this act, it shall be the duty "of the Governor forthwith to notify the Attorney-General "of the district in which is situated the place of business of "said company, failing or refusing as aforesaid of the fact, "and thereupon the Attorney-General shall immediately "proceed against the company to collect said sinking fund "*in the manner prescribed in the sixth section of an act* entitled "an act to establish a system of Internal Improvements in "this State, passed February 11, 1852."

The sixth section of the original act above referred to, and made applicable for collection of the sinking fund installments, is the one which provides for collecting the balance of principal due by the company at the time of the maturity of the State bonds, by suit in equity by the State against the company, and sale of the mortgaged premises under the decree in such suit.

The appellants' counsel in their brief (pages 208–9), take the ground that this Act of February 21, 1856, is not applicable in respect of such of the bonds as were issued *prior* to its passage. They say, "these changes of law as a remedy are operative as to all bonds issued after February 21, 1856, that is to say, as to most of the bonds in controversy" (page 209, Appellants' Brief). But it seems to us, there is no ground for denying the application of this Act of 1856, as well to the bonds issued before as to those issued

after its enactment. It was a mere change of remedy for this particular default, giving for it the remedy of sale, which was already provided by the act in respect of two other defaults (viz., by the sixth and thirteenth sections), and we submit, that it is quite clear, that the affording this particular remedial process was within the powers which the State had expressly reserved to itself by the twelfth section of the original act.

Now, let us suppose that upon default happening in the company meeting, one or more of the sinking fund payments due from it, the State proceeds to collect such sinking fund payments in the manner prescribed by this Act of 1856, and thereupon does collect them by means of the sale of the mortgaged premises, under decree in the suit thus instituted, and this happens, say twenty years or more before the time when the State bonds become due to the bondholders.

It is very certain that by means of these proceedings the lien of the mortgage will have been, not merely *enforced* but *exhausted*, and the whole title will have passed to the purchaser at the sale thus made under the decree, free and clear of all possible claim of both mortgagor and mortgagee, and of any and every one claiming, or to claim, under or in virtue of the mortgage, and the debt (sinking fund installment), for collecting which the sale will have been thus made and the mortgage extinguished, is a debt due and payable wholly to the State, and not at all to the State bondholder. It is thus clearly ascertained and demonstrated in the most practical manner, that the sinking fund installment, the collection of which has produced this result, *is* a part of the mortgage debt, and that the State is the party to whom alone such debt is due, and is the mortgage creditor.

Sale of the Mortgaged Premises, in virtue of the Thirteenth Section.

We have before referred to the thirteenth section of the act for the purposes of ascertaining the meaning of the

words, "payment of the said bonds," when used by the parties to this statutory mortgage. We have now to refer to the thirteenth section for another and different purpose.

It seems to us that the provisions of this thirteenth section, which we are now about to refer to, are alone sufficient to show the entire fallacy of the proposition maintained by the plaintiffs in regard to the real nature and character of this statutory mortgage.

Be it remembered that their proposition is, and it is only by the maintenance of that proposition that they can have any possible hope of success in this suit, that this statutory mortgage creates a *direct contract mortgage lien in their favor for the payment by the company to the State bondholders of the principal and interest of the bonds.* That such mortgage is *irrevocably* fastened to the property, and that *nothing can discharge it* without the express consent of the State bondholder *short of actual payment to him* of the amount of his bonds, principal and interest.

Now, in this thirteenth section of the act which is *alleged* to contain this *absolute and indefeasible mortgage lien in favor of the State bondholders,* we find these provisions, namely, that in case the State discovers that it has been defrauded in having been led to issue these bonds without such completely adequate security as by the first and second sections of the act was designed to be very carefully provided for (a discovery, which, if made at all, would of course have been made in some comparatively short time after such fraudulent obtaining of the bonds), the State was to file a bill in equity, and under decree in such suit *have the road sold and the proceeds paid into the State treasury,* where it was to be *kept invested in Tennessee State bonds* (of any kind, without restriction), creating a sinking fund established by the State, for the purpose of meeting its responsibility upon the bonds to the bondholders, when they should mature some thirty-five or thirty-seven years afterwards, in like manner as had been provided for by the before-mentioned seventh section of the act, in reference to the sinking fund thereby established.

The legal effect of the provisions of the thirteenth section is, to make the company's indebtedness to the State for the

borrowed bonds *fall due presently*, in case of its being discovered that the bonds had been fraudulently or improperly obtained, and in such case to *enforce the statutory mortgage lien forthwith by sale of the road*, and to have *the proceeds of such sale paid over to the State as the mortgage creditor*. Thus, the entire mortgage lien provided by this act, would be completely exhausted and terminated by the proceedings under this thirteenth section, some *thirty odd years before the time when the bonds would become due to the State bondholders*.

The complainants' counsel, finding themselves unable to dispute that the practical operation of the thirteenth section is to produce the precise result last above mentioned, undertake in their brief, on pages 233 to 235, to break the force of the heavy blow thus inflicted upon their theory of the nature and effect of the mortgage in question, by saying in substance, that the thirteenth section was to be put in practical operation only in the *exceptional case* of bonds being fraudulently obtained by a Railroad Company without compliance with the prescribed conditions, and that in fact only one such case of fraud actually occurred, and that the circumstance that, in such exceptional case, the State bondholders would be deprived of their *asserted* (we say *imaginary*) lien upon the railroad, and the State would collect the whole amount of the mortgage debt and put it in its treasury, by no means proves that the bondholders were to lose their lien in the other and ordinary cases provided for by the sections other than the thirteenth, and in support of this view they cite a decision of this Court in the Florida case of *Railroad Companies* v. *Schultc*, 103 *U. S.*, 141.

But, upon examination it will be seen that their argument does not at all meet the proposition which we present, founded upon this thirteenth section, nor does the authority they cite at all help them out of their difficulty, as the case in 103 U. S. R., was radically and utterly different from this.

Our argument is, *not* that a lien *which the bondholders would otherwise have*, is, because it might have been taken away

from them *in case* of the occurrence of the circumstance provided for by the thirteenth section, to be taken away from them *without* the occurrence of that circumstance.

Beyond all question, this mortgage is made *to the State* as mortgagee, and *not* to the bondholders.

The attempt of the complainants is to make out *by inference merely*, that the State was to have this mortgage lien *as trustee for the bondholders*.

It cannot be pretended that the statute contains any *declaration of any such trust*, nor any thing like it. It does not even use words having any tendency *in that direction*. The plaintiffs are undertaking to make out the trust by *inferences* founded upon what they claim to be the inherent nature of the mortgage security, and the necessary result of the fulfillment of the condition of the mortgage, whether by voluntary performance or enforcement and compulsory collection. And we cite this thirteenth section for the purpose of showing that *in that particular instance of enforcement* and compulsory collection, the act, *beyond possibility of dispute*, proceeds upon the basis that the mortgage belongs to the State *in its own right, and not as trustee* for the bondholders, and that the bondholders have nothing to do with it or its proceeds, but that such proceeds are receivable by the State alone. And, surely, this affords an argument of very great strength against the complainants' attempt to make out a trusteeship by inference.

In the Florida case there was no dispute, nor possibility of dispute, as to whether the State was trustee for the bondholders, because the *eleventh section* of the act *expressly declared* such trusteeship *in totidem verbis*, and when the State bonds were issued and negotiated by the company, for its own benefit, it receiving the proceeds, there was endorsed upon them a certificate, signed by the Governor, declaring that "*the State of Florida holds* the first mortgage bonds of the said Railroad Company for a like amount *as a further security to the holder hereof*." See Appellants' Brief, page 307.

The act contained a provision allowing the company to

make payment to the State for the loaned bonds, before their maturity, in money or other State bonds.

No such payment to the State had ever been made or offered to be made, and the *Railrad Company unquestionably still owed the indebtedness*, for the security of which the collateral securities, in question in the controversy, had been given to the State *upon an express trust for the bondholders.*

Nor was there any controversy in that case, as between the State and the bondholders as to their respective rights or interests or power of control over the collateral securities which the company had given for the debt, nor any question as to whether the trusteeship for the bondholders which the State had assumed, could or could not be enforced by the holders against it, without its consent, because in that litigation the bondholders sought, *with the State's concurrence*, to enforce the collateral security for the precise purpose for which it had been given, and in accordance with the clearly expressed trust for the State bond holders.

Under these circumstances the Court decided (and it is not easy to see how the party, against whom the decision was, could have imagined that it could be otherwise), that the collateral security was so enforceable by the parties who sought to enforce it.

The Court say that the circumstance that payment of the debt *might have been* made to the State in money or other stock *does not change* the character of the trust created by section eleven *in case no such payment is made.*

And they proceed to mention the two important facts:

1. Here no payment of any kind has been made.

2. No foreclosure of the lien has been attempted by the State, except in the interest of the bondholders.

The differences between the case at bar and this Florida case, are such as substantially to destroy all resemblance. The cases are *radically and utterly* different.

Besides, the very great difference before pointed out that in the Florida case, there was an *express trust created* in clear and unmistakable language, and the attempt was to *defeat it* because of the possibility of the happening of an event which had not, in fact, happened, while in our case there is merely an attempt to create a trust by mere inference and intendment, and the provision we are discussing shows that no such thing can have been understood or intended, are the other radical differences between the two cases, in respect of the subsequent occurences and in repect of the position assumed by the State.

In the Florida case, the company had the privilege of paying the debt in State bonds, but it had not paid it nor offered to pay it, either in that way or any other way. While keeping the money obtained by it from the sale of State bonds (which proved to be unconstitutional and therefore nullities), it proposed to pay nothing to anybody, but simply to cheat the creditors out of the money, and in thus doing, to defeat and *nullify the express trust*, although it had obtained the money from the bondholders upon the representation to them that the trust existed "*as a further security to the holder* of the bond." (p. 307 of Appellants' Brief).

In the case at bar, the mortgage provided for *periodical payments to the State*, on account of the principal of the debt, *to be made in State bonds at par*.

The thirteenth section enacts, that in the event that it provides for, the road shall be sold out under the mortgage and the proceeds paid into the State Treasury, and that there the amount shall be *invested, and kept invested, in Tennessee State bonds*, as a *State sinking fund*, by way of sinking, or as far as might be, providing for the payment by the State of such amount of its bonded debt at maturity.

And the present case is, that the company *has actually paid to the State the whole amount of the debt in State bonds at par*, in one payment in gross, thus leaving the State bondholder in substantially like condition, so far as respects any supposed security of the mortgage to him, as if the company had paid the debt in State bonds, in the installments provided for by the seventh section, or as if the road had been sold out at foreclosure and its proceeds paid to the State, and by it invested in State bonds under the thirteenth section.

The statement of the appellants' counsel that only one case for the application of the remedy provided by the thirteenth section actually arose, is of no importance whatever, in respect of our argument on this head.

It is, for our present purpose, entirely immaterial, whether this case provided for by the thirteenth section happened in one, two, five, or ten instances. If we could show that it happened in ten instances, it would not make the meaning and intent of these parties in respect of the character and ownership of the statutory mortgage, any clearer or plainer than our showing that it only happened in one instance, or that it happened in no instance at all, but was merely provided for in case it should happen. In any event, this provision for a case which might arise, is utterly irreconcilable with the theory of the other side as to the true character and effect and ownership of this mortgage, and as to the true rights and relations of these parties.

REMEDY UNDER SIXTH SECTION BY FORECLOSURE AND SALE, FOR COLLECTION OF ANY BALANCE OF PRINCIPAL REMAINING UNPAID BY THE COMPANY WHEN THE STATE BONDS MATURE.

SEVENTH.—We have now to consider the sixth section of the original Act of 1852. which is as follows :

" SEC. 6. *Be it enacted*, That if said company shall *fail* or

"*refuse to pay any of said bonds when they fall due*, it shall be the "duty of the Governor to notify the Attorney-General of the "district in which is situated the place of business of said "company, of the fact, and *thereupon said Attorney-General shall* "*forthwith file a bill against said company in the name of the State* "*of Tennessee*, in the Chancery or Circuit Court of the county "in which is situated the said place of business, *setting forth* "*the facts*, and thereupon said Court shall make all such or- "ders and decrees in said cause as may be deemed neces- "sary by the Court, to secure the payment of said bonds, "with the interest thereon, *and to indemnify the State of Ten-* "*nessee against any loss on account of the issuance of said bonds*, "by ordering the said railroad to be placed in the hands of "a Receiver, ordering the sale of said road, and all the prop- "erty and assets attached thereto or belonging to said com- "pany, *or in such other manner as the Court may deem best for* "*the interest of the State*."

It is entirely clear that the remedy by bill in equity, in favor of the State against the company, which this section provides, is a remedy reserved to the State, purely and simply in its own interest and for its own benefit, for the purpose of collecting such portion of the company's indebtedness, to it, for the amount of the borrowed bonds, as, at the time when such bonds should mature, should remain owing and unpaid from the company to the State.

The scheme of the original Act of 1852 did not require the payment of the annual installments, on account of the company's indebtedness to the State for the borrowed bonds, to commence until the expiration of five years, from the time of the completion of the road, and for this reason, as likewise because of possible irregularity on the part of the company in punctually meeting the sinking fund payments, required from it by the act, it might well happen that at the time the State bonds matured, there would be a portion of the amount remaining unpaid by the company to the State; and clearly this sixth section *does require* that the company, at the time when the State bonds shall mature, shall pay such remaining balance of its indebtedness to the State as may then exist. The State did not propose, at matur-

ity of the bonds, to advance, for the purpose of paying its bonds, this amount owing to it by the company, and take payment from the company in *subsequent* annual installments, but it did exact that, at this period of maturity of the State bonds, the company should pay the balance of its indebtedness, whatever such balance might be. And it is just as plain that this sixth section *does not require*, and never was intended to require, the company, at the maturity of the State bonds, *to pay such portion of the indebtedness as it had already paid*, by means of the annual installments on account of principal, and for which, by the express provisions of the seventh section, it was entitled to receive credit in its account with the State.

The sixth section provides for the filing of this bill in equity, only in case the company shall *fail or refuse* to pay the bonds, and clearly this must refer to a failure or refusal on the part of the company to make some payment which, *as between itself and the State, which was to be the plaintiff in the suit*, it was *bound* to make.

The theory of the plaintiffs is, that the bill in equity which this sixth section provides for, was to be filed by the State, not on its own behalf or in its own interest, but merely as a Trustee for the State bondholders.

No warrant for this assumption is found either in this sixth section or anywhere else in the act. The suggestion that the State of Tennessee held this mortgage as Trustee for the bondholders, and that this bill in chancery was to be filed by it in its alleged character of such trustee, has no other support than the imagination of counsel. *Not one word looking to any such conclusion can* be found in any part of this act, or in any act or thing said or done by any of the parties to this transaction.

We find in the opinion of Mr. O'Conor, and likwise in the appellants' brief, on pages 204–5–6, somewhat elaborate in favor of the proposition thus advanced by the plaintiffs, and great stress appears to be laid upon the circumstance that the sixth section provides that the Attorney-General shall file the bill against the company *in the name* of the State of Tennessee; from which it is argued that the State of Tennessee was not, and was not designed to be, the real plain-

tiff in interest in the suit, but that *its name was merely to be used* for the use and benefit of the bondholders; and in the opinion referred to, we find the counsel likening this case to the very common case of bonds of a certain class, *e. g.*, sheriff's bonds, administration bonds, &c., &c., given to the State or the people, as obligees, for the sole benefit of private parties in interest; upon bonds of which character, suits are constantly brought by the real party in interest, in the name of the State in one sense, and yet never in the name of the State pure and simple. In suits thus brought in the State of New York, the entitling is "The People *ex rel.* A. B." In some other States the entitling is "The State to the use of A. B." In whatever form such suits may be brought, they are never prosecuted by the Attorney-General, or other law officer of the State, and the State is never treated as a real party to them. The real party in interest brings the suit through his own attorney, using the name of the State as plaintiff in this qualified form, and the private attorney carries on the suit in all its stages under his own direction and management, precisely as if the relator, or person for whose use the suit is professedly brought, were the sole plaintiff. For all purposes the real party in interest is regarded and treated as the plaintiff in the suit; if anything is recovered in the suit he collects it, and acknowledges satisfaction; and if the suit be unsuccessful, judgment for the defendant's costs is rendered and collected from him as the real plaintiff.

If it is intended to liken to cases of this character the suit in equity which this sixth section directs the Attorney-General of the State to bring in the name of the State against the Railroad Company, upon its failure to pay its indebtedness, the proposition does not appear to us to require discussion.

The *natural mode* of providing by a law, for the filing of a bill to enforce the rights and equities of the State, is *a direction* that *the Attorney-General shall file the bill in the name of the State* as plaintiff; and in this connection it is well to ad-

vert to the thirteenth section of this Act of 1852, and to examine the provisions of that section for the filing of a bill in equity on behalf of the State, in case of its being discovered (which naturally would be shortly after the delivery of the bonds) that any railroad company shall have fraudulently obtained the issuance of the bonds of the State, or shall shall have obtained any of such bonds contrary to the provisions of this act.

We think the learned counsel for the plaintiffs will not undertake to dispute that the *suit in equity* which this *thirteenth section* provides for, *is the State's suit on its own behalf* and in own interest purely, and not a suit by the State as a trustee for its bondholders. And yet, in this thirteenth section we find *words precisely similar* to those which Mr. O'Conor and the appellant counsel rely upon, as showing that the suit provided for by the sixth section is not the State's own suit in its own interest, but a suit by or in the interest of bondholders in the name of the State.

The thirteenth section provides that upon the discovery by the Governor that any bonds have been fraudulently obtained or issued contrary to the provisions of the act, he shall notify the Attorney-General, whose duty it shall be to forthwith institute, *in the name of the State*, a suit in the Circuit or Chancery Court of the county of the place of business of the company, setting forth the facts, &c.

In the sixth section we find two declarations of the object and purpose of the chancery suit which it provides for, namely, "to indemnify the State of Tennessee against any loss on account of the issuance of the bonds," and the final clause to the effect that this indemnity shall be accomplished by receivership, or by the sale of the road, or "in such other manner as the Court may deem best *for the interest of the State*." We find *nowhere about this section*, any reference to the interest of the State bondholder, or even any mention of him. If this suit really were of such character as our learned adversaries assert, viz., the bondholders' suit, merely using the name of the State as their trustee, and purely in their interest, the provision that the decree shall be such as the Court shall deem best for the

interest of the State would be very inappropriate. We should naturally expect a requirement that the decree should be such as should be for the *interest of the beneficiaries, as real plaintiffs*, and not that it should be in the *interest of the trustee*, the *nominal plaintiff*.

In truth, reading this sixth section in the light of the circumstances surrounding this transaction at the time it originated, it is perfectly plain that it never could have been imagined that the State bondholders would have any interest, *even indirectly*, in the suit in equity, which this sixth section provides for.

The fact must ever be borne in mind, that when the Tennessee bonds in question were issued, the State was in high and unquestioned credit, and that when this Act of 1852 was passed the idea of failure on the part of the State of Tennessee punctually to meet at maturity its obligations to its creditors was no more in the mind of the Legislature, or of the people, or any one else, than is such an idea now entertained in respect of the issues of bonds of the United States or the State of New York, or any other sovereign power of unquestioned financial strength and ability, whose obligations, resting simply upon its own faith and credit, command a premium in the market.

The bill in equity provided for by the sixth section could never be filed until after maturity of the said State bonds, and, as it was never contemplated, or even imagined as a possibility, that the State would fail to preserve its credit untarnished, by meeting its own bonds at their maturity, whether the company which had borrowed them fulfilled its obligation to the State or not, it would be clear that before the time of the filing of this bill all possible interest of the State bondholder, either direct or indirect, would have terminated because of his having been paid by the State the full amount of his bonds. And thus it is also clear that the provision in this sixth section for such orders or decrees as might be deemed necessary by the court "to secure the payment of said bonds, with the interest thereon," refers to security of such payment *to the State* after it had paid its bonds at their maturity, in accordance with their tenor, and not at all to any payment of those bonds to be made under or in virtue of this suit in equity to the persons

who had been the holders of those bonds when they fell due.

It was said on the argument in the Circuit Court that in the enrolled act the words "to *secure* the payment of said bonds, with the interest thereon," read "to *receive* the payment of said bonds, with the interest thereon." How this is we do not really know; nor does it appear to us to be of any particular consequence, in favor of or against either party upon the question now in dispute, whether the word used be "secure" or "receive."

The filing of the bill, under the sixth section, could only occur *after* the bonds of the State had matured. Surely the complainants' counsel will not allege that it was the contemplation of this statute of 1852, under which it was proposed that credit should be sought in the market for the bonds of the State of Tennessee, of the new issue, to an amount from ten to twenty millions of dollars or more, that the State should hold forth to proposed purchasers of its bonds that in case the company to which it had loaned the bonds did not make provision for their payment the intention of the State of Tennessee was to let its bonds go to protest, and have a foreclosure suit brought for the benefit of the bondholders to collect the bonds, leaving the creditor to wait until the money should be obtained by that foreclosure suit. Is there anything of common sense in that proposition?

It is shown by the unquestionable evidence appearing in the record, without any attempt at contradiction, that the bonds of railroad corporations, secured by mortgage on the railroad, and endorsed or guaranteed by the State of Tennessee, were found not to be a satisfactory security, because the bond-takers wished, if they were asked to pay the full price, to have what were called the "straight bonds" of a sovereign State in good credit, the principal and interest of which bonds would surely be punctually met; because there was plighted for it the faith of a State whose name had never been tarnished. They desired to have the bond

in such shape as that the State could not avoid paying, with *absolute promptness*, principal and interest, when they should fall due, *as its own primary obligation;* that there should be no occasion or excuse for falling back upon pretenses for delay, by saying, "Well, it is true we have guaranteed this bond to you, and we will pay it to you some time or other, but you must wait awhile—a year or two, or a dozen years or more—until we see if we cannot get it out of somebody else, who ought to pay it." It was to avoid just that difficulty, which was found to exist in tee money market, against the negotiation of railroad mortgage bonds guaranteed or endorsed by the State of Tennessee, that this substitution of "straight State bonds" was made.

THE DECISIVE POINT, arising under the Sixth Section:

We come now to a point arising under this section, as to the decision of which there is, as it appears to us, no possibility of rational doubt or question, and the inevitable decision of which is, we confidently submit, *absolutely decisive against the entire claim* asserted by the complainants.

Suppose at the time this bill is filed by the State of Tennessee to collect such amount as the defendant in the suit has failed or refused to pay to the plaintiffs (giving fair and reasonable effect to every part of this section, and to every part of every other section of this act), we find the status to be that the State of Tennessee has received in annual installments on account of the indebtedness, for the collection of which the bill is filed., ninety per cent. of that indebtedness, which payments have been made under the positive injunction of the law, that that plaintiff shall be bound to give credit for them to that defendant; and suppose, then, that plaintiff asks the Chancellor to give it a decree against that defendant, not for the ten per cent. which is due from the defendant to the plaintiff, but for the one hundred per cent. which was once due, ninety per cent. of which has been paid and credited. The injunction of the statute is that the Chancellor shall make such a decree as shall give indemnity to the State of Tennessee. What does it need for completeness of indemnity, more than that it

shall receive the balance that is due to it, with any incidental expenses to which it may have been subjected such as exchange and commissions of such character as have been before referred to, and other incidental expenses which it may have been obliged to incur, in respect of the mortgaged premises, or the enforcement of the mortgage security?

Another injunction of the statute is that the Chancellor shall make such decree as shall be for the interest of the plaintiff. What interest has the plaintiff to have such a decree in its favor for one hundred per cent., when, unquestionably, it would be bound to refund to the defendant the ninety per cent.? Will our learned friends seriously say that it was designed by this statute that this plaintiff should have a decree for the one hundred per cent., disregarding the credit of the ninety per cent., which the law, in express terms, had said that it should give to the end and purpose that it might thereby cheat the defendant out of the ninety per cent., and throwing itself back upon its non-suable character, say to the defendant: "I have got your money; get it if you can?" Was that the end and purpose for which this statute was passed? Was the Attorney-General of the State of Tennnssee to come to the Chancellor and ask him, in the sacred name of equity, to make such a decree as that?

And, finally:

It had been expressly provided by the seventh section, that the installments on account of principal, paid by the companies under that section, shall, *as between the plaintiff and the defendant, in the suit we are now considering*, be *credited by the plaintiff to the defendant.*

It would be impossible, without utterly disregarding and overruling that provision of the seventh section, to render a decree in favor of the plaintiff, in the suit we are considering, for the whole original amount of the debt, in disregard of the payments on account actually made by the defendant to the plaintiff, and for which there was, under the seventh sec-

tion, an express obligation upon the plaintiff to give credit upon the debt.

And this simple proposition, we confidently insist, as we have always insisted, is of itself alone absolutely decisive of this entire controversy against the complainants.

Provision of the FOURTEENTH SECTION, for THE STATE'S "BUYING IN" the road, in case of its being sold under decree.

In the *fourteenth* section of the Act of February 11, 1852. we find the provision that whenever a railroad comes to a sale on foreclosure or enforcement of the lien, from whatsoever cause made, the Governor is to appoint an agent who, if it be deemed necessary to protect the State's interests, shall "*buy in*" the road *in the name of the State*. This clearly contemplates *buying* in by the State, as a *mortgagee entitled to the proceeds of the sale*, and *not* an independent *purchase* upon which the *purchaser will have to pay money* for his bid.

Every one understands the difference between "buying in," on a sale made for your own benefit, and purchasing as an independent purchaser, on a sale made for the benefit of somebody else. In the one case of "buying in," you give a receipt to the Master, and do not have to pay any money. In the other case, you do have to pay the money as a purchaser. Every one knows that practical difference, and every lawyer who has had any considerable practice, has had occasion to experience it, in the course of his practice, time and again.

What does this statute say? The agent shall "buy in" the road "in the name of the State." This mandate of the statute is to be immediately operative. If it were intended that there should be a purchase, upon which the money would have to be paid, it would have required an appropriation of the money. But there is nothing of the sort—not the faintest suggestion of any provision of any sort for buying in with money, or for supplying any money for such purpose.

And here, as everywhere else in the act, the statutory-mortgage is plainly treated as one belonging to the State, and held by it in its own right and for its own benefit, and not as a mortgage held by the State as trustee for others, as the plaintiffs undertake to claim.

THE POWER RESERVED BY THE STATE TO ITSELF BY THE TWELFTH SECTION OF THE ACT.

The twelfth section of the Internal Improvement Act of February 11, 1852, is as follows:

SEC. 12. Be it enacted: "That the State of Tennessee ex-"pressly reserves the right to enact by the Legislature "thereof, hereafter, *all such laws as may be deemed necessary* "to protect the interest of the State, and to secure the State "against any loss in consequence of the issuing of bonds un-"der the provisions of this act; but in such manner as not to "impair the *vested rights of the stockholders* of the company."

It is manifest that this was inserted as a very important and substantial provision, one which it might be of vital importance to the State to avail itself of, under the contingencies of the unknown future, during the period of forty years that the bonds to be issued under the act to the amount of so many millions would have run before maturity.

Yet the complainants give to it such a construction as *to fritter away entirely its efficacy.*

After examining with care, the arguments of our adversaries in respect of the nature and extent of the reserved powers possessed by the State, under this twelfth section, and tracing out the inevitable consequences of the construction which they insist upon, we think we are justified in saying that *the position assumed by them* comes, in substance, to this: *that whatever the State could have done without any such reservation of power they can do under such reservation, and whatever they*

could not have done without the reservation, they cannot do with or under it.

That *that* is not the legal construction is too plain for argument. It is very certain that the reservation of powers to the State, by this twelfth section, was deemed to be a matter of most material substance in the interest of the State. Full effect must be given to all acts of the State as in exercise of the power, *conforming to its scope as defined by the language, and not transgressing the specified restriction.* Certainly, if the exercise of the power by the State is *in good faith* (and, we do not even concede the right of this Court to sit in judgment upon the question whether or not the acts of this sovereign State are or are not acts done in good faith), *it is for the State and not for the Court to determine*, what things are necessary to be done under the reserved power in order to accomplish the end for which the power is expressly stated to be reserved.

There is no just reason for adopting a narrower general view of the limits of this State's power, under this reservation made by it, than is adopted by this Court in relation to the exercise by Congress of the powers granted to it by the Constitution of the United States.

But it is not at all necessary, nor perhaps proper, to enter in this case upon the discussion of a general question so important and so delicate as that just adverted to.

This much is certain: that no construction can be properly adopted, which does not give scope for the practical exercise of the powers which it was the *real intent and meaning* of the section to reserve to the State, nor any construction which does not *give reasonable latitude* to the Legislature to *determine, in its discretion, what laws are necessary*, under the circumstances existing at the time being, *for accomplishing the purposes for which the power is declared to be reserved.*

The power reserved is—*not*, to pass such laws as may *be* necessary—*but*, to pass such laws as may *be deemed* necessary—and no one can fairly deny the meaning of this to be —"to pass such laws *as by the Legislature may be deemed* necessary"—for accomplishing the purposes referred to.

Plainly, the words, "be deemed," were used as being broader than the word "be," and with the express design of thus broadening the power, or, at least, of avoiding legal questions, which might otherwise be raised as to the competency of the Legislature to do, thereafter, things which it might deem it proper to do in the State's interest, as in exercise of the power reserved.

It was perfectly lawful and proper for the Legislature to entertain and express such a design, in the enactment of the section in question, and it is neither the duty nor within the just power of any Court to *frustrate* that design.

The complainants' counsel, in conducting an argument upon the general question, now under discussion, will hardly venture to deny that the statute in question was designed to reserve to the State *some substantial and beneficial powers*, and that it must be construed so as to produce that effect.

The language in which the power is reserved, is extremely broad and general, and there is *but one restriction expressed*, viz., that the power shall be exercised "in such manner as not to impair *the vested rights of the stockholders* of the companies."

Now, upon observing that there is this restriction, against impairing the rights of the stockholders, the question at once presents itself. If the holders of the State bonds were considered to have any interest, at law or in equity, in respect of the statutory mortgage taken by the State, and if it was designed to forbid the impairing of those rights by any modifications or variations of the provisions of the mortgage, or the rights or remedies of the State under it, why did not the Legislature, when inserting a provision for protecting the vested rights of the stockholders of the company, make it broad enough to protect, also, against impairment, the rights of the State bondholders.

As they have not done so, we submit that one of the two following conclusions is deducible from the omission.

Either

1. It was not considered that the State bondholders had or could have, any interest in the matter,

Or

2. It was *not* designed to tie the hands of the State from doing whatever it might deem necessary within the general scope of the power granted, irrespective of any supposed or supposable rights of the State bondholders.

And thus, the stockholders being named, and the State bondholders not being named, in the restricting clause, the axiom, "*expressio unius, exclusio alterius*" applies.

But, we do not mean to say, that we consider that *as matter of fact*, the reason why the State bondholders are not named in this restricting clause is at all doubtful; or that there is really occasion for stating *alternatively* as above, the reason for the omission.

We submit, that upon the whole matter, as now before the Court, upon the evidence and the admissions of the parties in relation to undisputed facts, it is entirely clear that the reason why the holders of the State bonds are not mentioned or referred to in this clause of restriction is, simply, that at the time of the passage of this act, *the idea that the State bondholders had or could have any right or interest*, either at law or in equity, in the mortgage taken by the State for its reimbursement for the loan of the State bonds, was *not at all in the contemplation of the Legislature*, and had not really entered *the mind of any one*.

We have before said that upon the construction which the complainants claim to give to this twelfth section, the section becomes practically useless and meaningless, and we will now proceed to inquire whether or not that is so. Our meaning of course was, and so we ought, perhaps, in strictness to have said, that upon the complainants' construction, the twelfth section becomes useless, *if* the complainants' construction of the nature and effect of the statutory

mortgage, and their version of the alleged rights of the State bondholders upon which their present claim is founded, be held to be correct.

The claim made by the complainants, and which they must sustain before they can have any chance of recovery, is, that in virtue of the provisions of the statutory mortgage, the State bonds *are specific contract liens in favor of their holders* upon the company's railroad and other property, and that the State holds the mortgage, not at all in its own right, but simply as trustee for them, the bondholders, just as in the case of a railroad company's issue of its own mortgage bonds, secured by a mortgage upon its railroad to trustees for the bondholders; that thereby each State bondholder has an absolute mortgage lien, by contract, upon the company's railroad, and irrevocably fastened upon it, for the direct payment by the company to him, the bondholder, of the principal and interest specified in his bond, which lien and right of the bondholder is, by the Constitution of the United States, absolutely protected against impairment, and that *nothing can discharge or impair it*, short of the absolute payment to him, the bondholder, in lawful money, of the principal and interest of his bond at the respective times for such payment specified in the bond. And if the complainants be right in the position which they assume, the legal *status* of the matter substantially is just what it would be if there were as many separate mortgages as there are bonds, one to each bondholder, and then all the mortgages were assigned to a common trustee, under an agreement of all parties that the lien of all the mortgages shall be *concurrent and pro rata*, and that the rtustee should hold all the mortgages merely for the account and benefit of the bondholders to whom they were originally given.

Now we ask, *if* such be in legal effect the status, and *if* the twelfth section is to have the construction which the complainants, *what thing, of any practical value or utility*, can the State do, under or in virtue of the twelfth section?

We submit that the answer can only be—NOTHING.

We do not undertake to discuss what in particular could

or could not be done by the State, upon such a status and upon such a construction of the twelfth section, because *no such thing*, of any substantial effect, presents itself to us as one fairly open to discussion. Any thing and every thing that would be of utility would apparently have to be condemned and rejected.

We leave it to the complainants' counsel to point out or suggest, if they can, any substantial thing that could be done by the State in respect of the subject matter to which the twelfth section relates, upon their construction of it, and upon the assumption on which they proceed, that the State bondholders are the real and beneficial mortgagees, and that the State holds the statutory mortgage not in its own right, but as trustee for them.

And now we propose to enter upon a more elaborate consideration of the purpose and intent of this reservation of power to the State by the twelfth section, the practical importance to the State of its possession of such power to the extent and effect with which we claim its existence, and the subversion of such purpose and intent which would be consequent upon the adoption of the propositions asserted by the complainants; and then to examine the question whether the action taken by the State under the statutes of 1869 and 1870, in settling with the so-called "solvent" Railroad Companies by receiving payment of their indebtedness to the State for the loaned bonds by receiving State bonds at par for the full amount of such indebtedness, and thereupon releasing the State's mortgage lien, or transferring it to the parties who supplied to the Railroad Companies the means of making such settlements, were or were not in fair and legitimate exercise of the powers vested in the State under the twelfth section, supposing any aid from that section to be requisite in order completely to justify and validate such doings of the State.

IMPORTANCE TO THE STATE OF ITS POSSESSION OF THE POWER TO MODIFY AND DEAL WITH THE MORTGAGE SECURITY AS ITS VIEWS OF ITS INTERESTS AT THE TIME BEING MIGHT DICTATE.

We desire to now call the attention of the Court to the practical importance to the State of Tennessee of the possession of such a power as this, and to the great practical disadvantage to the State of the power being construed to be limited to such effect as our learned adversaries claim. It is always useful to a creditor who holds a large claim against a debtor and a security for it, where the debtor may fall into embarrassment, that he should not be trammeled by any interfering rights of any one else in dealing with that debtor and the security, as his uncontrolled discretion, for his own interest, may dictate to him as his best course of conduct. Sometimes it is for the creditor's pecuniary interest to enforce with strictness, even with harshness perhaps, or an approach to harshness, his rights. Sometimes such a course as that tends to the immense depreciation of the security, and may render it almost or entirely useless. Certainly any one would say that a large capitalist, engaged in the business of making very large loans on collateral securities, where there was a possibility of embarrassment falling upon the debtor and difficulties occurring in respect of his securities, would be extremely unwise if he voluntarily fettered himself so that, as the shifting circumstances should arise, he could not take that course of action which should then seem to him to be most judicious for the protection of his interests. But most especially was it so where a series of enterprises of this sort were engaged in. There was something peculiar about them. The State of Tennessee entered into the enterprise of advancing large sums of money for the construction of long lines of railroad, where, of course, the substantial value of the thing which the State took as its security was in great measure dependent upon the completion of the line. If it remained fragmentary the security might be worth very little. It might well happen (irrespective of such an unexpected disaster as

the war), in the ordinary course of affairs, that the promoters of an enterprise of this character, having gone on a certain distance, and built one or two sections or more of the road and received the State bonds for them, would fall short of funds. To use a homely phrase they might get stuck in the middle, and what they had built would be substantially worthless, unless new means could be found in some way for carrying through the enterprise. It might well happen that the holder of the security upon the unfinished thing might find it to be greatly for his interest, almost a necessity, to prevent the substantial loss which might otherwise overtake him, that he should be able to make radical changes in respect of the security. He might well have the sharp, practical question presented to him, whether he should go on and finish that railroad himself, or induce somebody else to furnish the means of going on and finishing it, by consenting to subordinate his lien for the money which he had already advanced, to the lien given to the persons who furnished the means to complete it, or to go on and sell out for the benefit of the mortgagee the uncompleted road, in like manner as was provided by the thirteenth section as to roads, in respect of which the State bonds had been fraudulently obtained, or to sell and transfer his mortgage for such price as he could obtain for it. His choice might be between doing one of these four things or abandoning the whole security as worthless; and that might well have been the consideration eventually presented in respect of one or more of these Tennessee railroads. It was not the policy nor the purpose of the State to make itself the owner of the railroads, and every one will agree, we think, that it ought not to be the policy of any State to do any thing of the sort. It would have been in the last degree unwise for the State of Tennessee to place itself in such a position as that, if one of these railroads fell into embarrasment, it would necessarily have to go on and finish the road itself, or abandon the unfinished portion as worthless and let it go to ruin.

At all events, it is clear enough that the State of Tennessee, when it enacted the statute, had no idea of putting itself in such a position.

Rejecting, then, as wholly contrary to the intention and

plan of the act, the idea of the State's going on and finishing the road itself and becoming the permanent owner of it, there would remain to the State, under the circumstances supposed, only the other alternatives, viz.:

1. Subordinating the State's lien to that of other capitalists, who would furnish the necessary money to complete the road.

2. Selling out the road under the mortgage for the State's benefit, for such price as could be gotten for it.

3. Selling and transferring the State's mortgage for such price as was obtainable to some one else, who (presumptively) would undertake the redemption of the "failed" enterprise, or in some other practical way deal with the "wreck" as might be prudential and advisable upon business considerations.

Now, according to the doctrines maintained by our learned adversaries, the assumed rights of the State bondholders would entirely prevent the State from adopting any one of these alternatives, and the only remaining alternative left to it would be to let the road go to wreck and ruin, and practically abandon the mortgage security as worthless.

The plaintiffs' counsel apparently accept these results as the legitimate consequences of their doctrine, and in some at least of the "sold road" cases, with the "courage of their convictions" as to the true nature of the statutory mortgage and the rights of the bondholders under it, and as to the utter non-efficiency for any practical purpose of the State's reservation of power by the twelfth section, they stoutly maintain that it was wholly beyond the power of the State to sell out under decree, as of foreclosure, one of these roads (the Memphis, Clarksville and Louisville), and that the alleged lien of the State bondholders upon that road now remains in full force and effect, notwithstanding the unquestionable facts, which are even admitted by their own stipulation, that the road had been by the calamities of the war brought to a state of dilapidation and almost ruin (Record, page 1209), and that "to have kept "such a road in operation through a Receiver until the "State bonds loaned to it matured, would have cost

"the State millions of dollars; to have allowed it "to remain unused, would have been equivalent to aban- "doning it to waste and destruction, and to the company "keeping it up, they were utterly insolvent," and had instituted proceedings for going into voluntary bankruptcy, some time before the road was sold out under the State's mortgage (Record, fo. 1210). And, the road having been bought by the Louisville and Nashville Railroad Co., and annexed to its own system of roads, and, having been by it "rehabilitated," for which purpose it had issued its own first mortgage bonds upon it for nearly two and a half millions of dollars (Record, fo. 1211), the complainants highly meritorious claim in one of the cases now before this Court, is, that they and their associates in interest, have the first and complete lien for the full amount of the State bonds originally loaned to it, in subvertion, not only of the title acquired by the Louisville and Nashville Railroad Company under the State's foreclosure sale, made in pursuance of the Act of 1871, for selling out the insolvent roads, but in subvertion of the lien of the new mortgage bondholders, who furnished the money for converting the road from its former position of wreck and worthlessness, to its present one of substantial value.

It will be for this Court to pronounce, supposing the construction of the twelfth section to become at all material as a practical question in the decision of these causes, whether the construction of that section contended for by the complainants, leading to such necessary consequences, and to such particular practical results, as we have above adverted to or pointed out, is or is not a just and proper construction of the powers reserved to the State by that section.

Pursuing the discussion upon the twelfth section, we have further to say:

Any subsequent alteration which the State may or might have chosen, in its discretion, to make in the regulation of the time or manner of the company's making satisfaction of its indebtedness to the State for the borrowed bonds, or in respect of managing, enforcing, or dealing with the

security which it originally received for its reimbursement or indemnity, could not be regarded as an infringement of any supposed rights (whether resting in legal obligation or in good faith) or any just and reasonable expectations of its own bondholders.

If it is to be supposed, on behalf of these State bondholders, that they took their bonds, relying in any degree upon any supposed security to them, or for their benefit, of the statutory lien which the State might hold under the Act of 1852, they must, of course, be taken to have done so, *in view of the whole act, including and subject to the reserved power of the State*, under the above quoted twelfth section, and *to the future exercise of that power by the State*, in such manner as it, *in its discretion*, might deem advantageous for its own protection, and in its own interest. When the legislation of 1869–70 was enacted, the claims of the State against these broken Railroad Companies, crippled by the war or otherwise, was in such condition of jeopardy and embarrassment, that no small degree of latitude might fairly be deemed essential, in order to enable the State to obtain from them, in some form, satisfaction of the State demands against them. And, even if this Court could, *as it seems to us clear they cannot*, sit in judgment upon the question, whether the Legislation of 1869–70 went beyond a fair exercise of the State's discretionary powers, reserved by the twelfth section, it would be impossible to pronounce that such legislation in any way transcended those powers; on the contrary, it is manifestly no more than a fair and reasonable exercise of them. It is akin to the provisions of the Act of March 20, 1860, varying the payments required from the Railroad Company, so as to oblige them to pay 2½ per cent. annually, to the sinking fund, instead of 1 per cent., and diminishing their interest payments, by limiting them to the provision for the unsatisfied amount of bonds, instead of the whole original amount, as theretofore.

Whatever may be thought or held in regard to the power of the Court to impose, in its discretion (substituted for the discretion of the State), limitations or directions in respect of the particular manner in which this reserved power

shall be exercised, it seems to us quite clear that *what the State did* under the Acts of 1869–70 was *no more than a fair exercise* of this reserved power, and did not deprive the State bondholders of any vested rights, which it may be possibly supposed they had, or could have been entitled to under or in virtue of the statutory mortgage, as it stood under the original act, and the amendments which had been made to it, from time to time, before the war, and while the bonds were in process of being issued to the company, and *with the complete acquiescence of both the companies and the State bondholders.*

When the settlements were made between the State and the companies, under the Acts of 1869–70, the *status* was, that the companies were largely in arrear to the State on account of the principal of the indebtedness in the shape of the required payments to the State by way of installments to the State sinking fund, which had fallen due and remained unpaid, and *at that time, there existed a complete power in the State*, under and in virtue of the Act of 1856, *to sell out the roads* of the companies for raising the amount due to the State upon her sinking fund installments, and thereby to give a complete title to the roads to purchasers at such sale, wholly freed and discharged from any possible lien or claim, either of the State or the State bondholders or any one whomsoever, under or in virtue of the statutory mortgage lien, created by the Act of February, 1852, with its amendments.

The evidence that, at the time of the settlements made by the State in respect of the debts due by the Memphis and Charleston Railroad Company, and the East Tennessee, Virginia and Georgia Railroad Company, respectively, those roads were largely indebted to the State for arrears of the sinking fund installments, so that they were then subject to be sold out under the Act of 1866, whereby the title to them would have been completely vested in the purchasers at such sales, free from any possible lien or claim of any one, under the statutory mortgages to the State, will be found in the record as follows:

Such evidence in relation to the Memphis and Charleston Railroad, at page 587, and such evidence in relation to

the East Tennessee, Virginia and Georgia Railroad, at pages 586 7.

In relation to roads thus situated, we submit with entire confidence the proposition, that whatever limitations a Court may conceive itself entitled to impose upon the exercise of the reserved power which the State held, under or in virtue, of the twelfth section, it cannot be held that the bondholders could successfully impeach the act of the State in making sale of a road, or assigning or releasing its mortgage, for a consideration payable in State bonds, merely because, having an unquestionable right under the Act of 1856 to sell out the road, *under and in enforcement of the mortgage*, for non-payment of the sinking fund installments then in arrear, and by thus foreclosing the mortgage to terminate such rights, if any, as the bondholders had, the the State chose (exercising its powers under the twelfth section) *to adopt the course of working out the same substantial result by the adoption of another form or method.* If the State had sold out the East Tennessee, Virginia and Georgia Railroad in the month of June, 1870, for the non-payment of the installments on account of principal which were then due from the Railroad Company to the State (and in respect of which there then existed a complete power to make such sale, under and in virtue, of the act passed fourteen years before), *the proceeds of that sale would have gone into the treasury and been invested in Tennessee State bonds,* and that would have been all that these bondholders could point to as representing the railroad, on which they imagine they once had a lien; but they could only point to it, they could not lay a finger on it. If the proceeds of that sale had been in the State Treasury, there is no way that the State bondholders could have got at them; and if they could, such proceeds would have been found to consist simply of Tennessee State bonds, *precisely the like thing as the proceeds of the settlement actually made with us.*

What did the State do in the case of the East Tennessee, Virginia and Georgia Railroad? Instead of selling out the railroad for non-payment of the sinking fund arrears under the then existing power of sale, and putting the proceeds

into the State Treasury, they saw fit to enter into another arrangement, by which they received payment of the debt in Tennessee State bonds, and put the same into their treasury, and in this there is found nothing but *a change in the form of accomplishing the result*, which they had a clear right to accomplish, under legislation long anterior to the war, and which is wholly unchallenged. My proposition is: That, having power under the original act as amended in 1856 to accomplish a substantial result by one method, when, in virtue of this twelfth section (which certainly means something), they chose merely to adopt another form of accomplishing the same result, which left these bondholders in a like position substantially as if they had pursued the old method, the Court will not hold (whatever it may say in respect of the limitations of the power reserved by the State under this twelfth section) that they had not power to make that change of mere form.

And we may further say in this connection that it appears to us that in considering the question of *supposed indefeasible rights* of the State bondholders, restricting the State from doing such acts as it might conceive it to be for its own security, protection and interest to do, and which, in virtue of the reserved powers of the twelfth section, would be clearly permissible as between the State and the company, the unquestionable fact that by the terms of the *thirteenth section of the original act*, the State bondholders were exposed to have *whatever mortgage security* they may be *supposed* to have had, *completely swept away by* the State's action, without any payment whatever being made to them, completely negatives the idea that they had any such *indefeasible* rights as to entitle them to impeach or complain of the acts done by the State under the Acts of 1869–70.

In this connection it may be proper to notice an argument used in the opinion of the Master in Chancery in the South Carolina case, and which our adversaries seem disposed to adopt and apply to this case, viz.: that *inasmuch as* it is provided in an earlier section of this act that *the Railroad Company shall have no right*, at any time after the bonds are issued for the first section of the road, and the mortgage

thereby "constituted," or "instituted," to put any other lien on the road which could interfere with or prejudice the lien or mortgage of the State, *ergo*, the *State has no right*, under the twelfth section, to make or agree to any modification of the *lien*, terms, effect or provisions of the mortgage as originally arranged, and which under subsequently occurring circumstances it may deem necessary for the protection of its interest, and the strengthening of the mortgage security, *e. g.*, as in the South Carolina case, to consent to *subordinate* the State's mortgage to a new one created in favor of capitalists, for securing a new cash loan made by them for completing the road, when abandoned by the original company in a half-finished state so as to be of little value, or for rehabilitating the road after it has been wrecked and nearly ruined by the storm of war, or from any other cause, when such subordination is a condition without which no one could be induced to make the necessary fresh advance of money.

The proposition appears to us to be utterly illogical and unsound, and we do not think it can be necessary for us to do more than to put it in the foregoing argumentative shape, showing what, in substance and effect the proposition really is, in order to exhibit its manifest fallacy.

General scope and purpose of the Internal Improvement Act, and the surrounding circumstances, as affecting the question whether this was the State's Mortgage or the Bondholders' Mortgage.

Thus far we have discussed in great detail the particular operative provisions of this statutory mortgage, for the purpose of thereby ascertaining its legal construction and effect in respects of the points here in controversy.

We propose now to take a broader and more comprehensive view of the question, and to show that in substance and effect, as well equitably as legally, this was the State's mortgage and not the bondholders' mort-

gage, by exhibiting the general scope, scheme, and purpose of the statutory mortgage and of the transaction of which it made part, and the surrounding circumstances; and thus we shall reach the same result, in respect of the question at issue, as is reached by the consideration in detail of the operative provisions.

(1.) Upon *the face of the documents*, there is *no appearance or suggestion whatever* of there being any mortgage lien accompanying or securing the bonds. The bond, *the only document which the bondholder holds or ever hears of in connection with the transaction*, is an ordinary State bond, payable to bearer, whereby the State promises to pay the specified amount of principal and interest, and pledges its faith and credit for such payment, *and that is all.* There is *nothing* in any way *indicating* to the taker or holder of such a bond that *the Railroad Company has or ever has had any connection with it* in any shape or form whatever.

The form of all the bonds which were issued previous to the war *does not even show that the bond is issued under the Internal Improvement Act.* It merely states that the bond "is issued in pursuance of and under the provisions of *an act* of the General Assembly of said State, passed at its session of 1851–2," and that for its payment *the faith of the State of Tennessee is irrevocably pledged.*

At the session of 1851–2, there were passed *seven acts* providing for the issue of Tennessee State bonds, some of which were *for the State's own purposes*, and for turnpikes, &c., in connection with which there could be no possible idea of a lien, and *all the bonds* issued for the *various purposes* of these seven acts, *including the act in question*, were issued in precisely the same form, and engraved from the same plate.

The new issues of bonds, made subsequently to the war, are in precisely the same form, with the single variation that they are declared to be issued under the Internal Improvement Act of 1851–'2, and the amendments, thereof, but there is no further statement of the purpose for which they are

issued, and no specification of their having been issued to any particular railroad.

As to these recitals, whether in the *ante-bellum* or the *post bellum* bonds, the sole purpose of the recital manifestly was, merely to indicate the authorization of the State, under which the State officers issue the bond—to authenticate it as a regular and legitimate issue of the State's obligation—following, in this respect, the universal, or almost universal, practice in respect of all bonds issued, *for whatsoever purpose*, by governments or municipalities.

Then great stress is undertaken to be laid upon the circumstance that the act provides that the State officers issuing these bonds shall keep a register of them, showing the numbers of the particular bonds, and for what purpose, and to whom they were issued. But this was merely following the universal rule, not only of governments or municipalities, in issuing bonds or obligations of any sort, but of banks and other private corporations in issuing their obligations, even down to bank notes, for the payment of one dollar. Who ever heard of a government, a municipality, or a bank, or other corporation, with even decent regularity of management, which did not keep a complete register of the numbers of all the negotiable securities issued by it, and the purposes for which such issues were made?

(2.) The only imaginable object or purpose of the creation of this mortgage lien, as a direct lien in favor of the State bondholder for his security, and *controllable and dischargeable by him only, and not by the State*, must be the *facilitating the negotiation of the bonds by increasing the strength of the security* provided for their payment. *If there had been created this mortgage lien in favor of the bondholder, for this end and purpose*, we *should*, of course, *find it referred*, to either in the bond itself, or in some certificate endorsed upon or accompanying it, *or in some document* accompanying the bond, *which would carry information to the taker of it* that it was *entitled to the benefit of this mortgage security;* as is universally the case in all railroad mortgage bonds and other securities of that nature. We always find, in securities of that

character, a clear declaration, usually in the bond itself, and, if not, certainly endorsed upon or accompanying it, showing it to be secured by a specified mortgage lien, and usually declaring, briefly but with precision, the character and extent of the mortgaged property, the *grade* of the mortgage lien, *i. e.*, whether first or second, and the amount of securities issued or issuable under the mortgage. In the case of these Tennessee bonds, as we have said, we find nothing of the kind. If it had really been intended that this should be a mortgage for the benefit of the bondholder, for strengthening his security, and such lien had been created for the purpose of facilitating the negotiating and helping the price of the bonds, upon their passing from hand to hand in the usual course of business, it is difficult to see *by what method* the existence of such collateral mortgage security *could have been more studiously and completely concealed from the actual knowledge or notice of the bondholder*, than was the result of the form of bonds which were issued and put in circulation in this case, namely, Tennessee State bonds, pure and simple.

In order to support the plaintiffs' pretension as to the nature and character of this mortgage security and its alleged indefeasible possession by the State bondholder for the security of his bond—in face of the circumstance, plainly apparent, that by force of the sinking fund provision the company is absolutely forced to pay to the State itself, before the maturity of the bond, the whole or nearly the whole of the amount of the principal sum secured by it—the plaintiffs are forced to contend, in substance and effect, that upon borrowing these State bonds, the railroad company assumed an obligation to pay, *twice over*, the amount it received, one obligation to pay the State by means of the sinking fund installments, and the other an obligation to pay the amount to the State bondholder.

Now, if it be assumed that the company was willing to subject itself to this double obligation for the one amount received by it, to the end of being thereby better enabled to negotiate the State bonds which it received and to obtain a better price for them, it is *absolutely incredible* that such forms should have been given to the documents as to conceal, as was here done, from the taker of the bond, and

from all subsequent purchasers of it, the existence of this duplicate lien.

(3.) It is proved in this case, without any attempt at contradiction, and beyond controversy, that at the time of the passage of the original act under which these statutory liens were created, the six per cent. bonds of the State of Tennessee, pure and simple, not issued to any railroad company, but issued for the State's own purposes and resting alone upon its faith and credit, and in respect of which there could be no pretense of the existence of a lien in favor of any one upon any thing, freely commanded in the market not only par, but a premium. There was no earthly necessity for superadding to the Tennessee State bonds which were loaned to the companies, a mortgage lien upon the railroads, in favor of the bondholders in order to facilitate the negotiation of the bonds. Without any such aid the bonds themselves were the equivalent of so much money, and circulated at prices above par.

Record page 1128

And finally this was in substantial effect admitted by the complainants by stipulation.

Record, page 1,190–1,191.

Prior to the Internal Improvement Act of 1852, there had been a system for some time in operation, and to a very considerable extent, under which Railroad Companies issued their own bonds, endorsed or guaranteed by the State, and which were secured by mortgage on the railroad.

(4.) It is distinctly proved, wholly uncontradicted, and must be taken as a fact conclusively established by the testimony, that Tennessee State bonds, pure and simple, resting upon the faith and credit of the State and upon that alone, had a better credit, and commanded a higher price in the market, at the time of the passage of this Internal Improvement Act and of the negotiation of the bonds issued under it, than the mortgage bonds of Railroad Companies endorsed or guaranteed by the State of Tennessee.

Record, pages 699–700.

The difference in price between Tennessee State bonds, pure and simple, called straight bonds, which could have no possible pretense of lien upon anything, and the mortgage bonds of the Railroad Companies, was from *one to three per cent. in favor of the State bonds, pure and simple.*

Record, page 700.

(5.) It is distinctly proved by numerous witnesses, wholly uncontradicted, and established by the testimony in the case beyond possibility of controversy, that the Tennessee State's Bonds issued to the different Railroad Companies under this act, as well upon their original sale or negotiation by the Railroad Companies as in their subsequent sale and negotiation and passage from hand to hand in the ordinary channels of business, from the time when the bonds were first commenced to be issued under this act up to the time of the institution of this controversy in the year 1878—*a period of more than twenty-five years*—were *always* sold, negotiated, dealt in and regarded, as being *purely and simply State bonds and nothing else*, and without any idea being entertained by the buyer or seller, or by any one connected with the transactions, that they were accompanied by any mortgage lien upon a railroad; and that these six per cent. bonds issued to the Railroad Companies under the Internal Improvement Act, and negotiated and put in circulation by the Railroad Companies which received them, *invariably sold in the market at precisely the same prices as the Tennessee State Bonds issued for the State's own purposes, e. g.*, for raising the capital for its State Bank, for the building of the State Capitol, purchasing the Hermitage, and other purposes in which the State alone was interested, and in respect of or connected with which bonds there was no possible lien or suspicion of a lien of any kind in favor of any one.

And, finally, the substance of these facts was admitted by the complainants by the stipulation which will be found on the Record, page 1192, as follows:

"After the loan of bonds to railroads there was no differ-

" ence in the money market between price of the bonds " loaned to railroads or those issued by the State to raise the " capital of the Bank of Tennessee, or to build her state " house; nor, was there any difference in price between the " bonds loaned to the most valuable railroads and those " loaned to the most worthless, except, that in both of the " above cases a *difference of from two to five per cent.* on " *limited transactions* has arisen within the last two years " (*i. e.*, the two years prior to August 14, 1879) in the *open* " market in New York, but no difference has *ever existed on* " *the Stock Exchange of New York* owing to the way in " which Tennessee bonds are called at said exchange."

(6.) The Act of February 11, 1852, throughout, speaks of and refers to the statutory mortgage in question as *the lien or mortgage of the State*. The fourth section of that act provides, in its concluding clauses, that after the Governor shall have issued bonds for the first section of the road it shall not be lawful for said company to give, create or convey to any person or persons, or body corporate whatever, any lien, incumbrance or mortgage of any kind which shall have priority over, or come in conflict with, *the lien of the State herein secured*, and any such lien, incumbrance or mortgage shall be null and void *as against said lien or mortgage of the State*, and said lien or mortgage of the State shall have priority over all other claims existing or to exist against said company.

There is no room for doubt in relation to the meaning of the word " of " as here used. It is the brief expression of " *belonging to* "—and thus we have repeated declarations of the State's *proprietorship* of this lien; against which, it is idle for the plaintiff to contend that the State held as their trustee, and not for itself in its own right.

It will be within the recollection of this Court, whose members were trained in the niceties of special pleading at common law, that under that system, with all its precision and strictness, the accustomed, and, indeed, almost the only form or method of alleging *proprietorship*, whether of lands

or chattels, was simply by the use of this little word "of," Take a volume of Chitty's pleadings, and you will find in the precedents, on page after page, running all through, that the *sole allegations of proprietorship* are thus made—"the goods and chattels of the said plaintiff," "the close of the plaintiff," &c., &c. *In no other way* is it alleged that the plaintiff was owner of, or in any wise interested in, the subject-matter out of which the cause of action arose.

(7.) The first section of this Act of February 11, 1852, provides for the furnishing by The East Tennessee and Virginia Railroad Company, before it shall be entitled to receive the loan of the bonds, of evidence that the section of the road for which the loan is to be made is not, nor is any part thereof, subject to any lien whatever *other than those created in favor of the State by the Acts of* 1851–2.

Upon examination of the other Acts of 1851–2, here referred to by the act in question, as having created liens *in favor of the State*, it will be found that they are *identical in general character and legal effect* with the lien created under the Act of February 11, 1852, which the plaintiffs here claim to be liens in favor of the State bondholder, and not liens in favor of the State. These *other* acts contain the words, "that the bonds shall constitute a lien," and that the lien shall be "for the payment of said bonds," upon which the argument in support of the plaintiffs' positions, in these cases, is mainly undertaken to be built up.

(8.) Upon full and careful examination of the statute, which creates the mortgage in question, it will be seen that, throughout, it speaks of and treats the State of Tennessee as the party in interest as mortgagee; that all the payments are provided to be made to the State, all the remedies for collection which are given are given to the State, and that the State bondholders are nowhere mentioned, or in even the remotest degree alluded to as having any interest in the mortgage security, nor, in truth, are the bondholders mentioned or alluded to at all.

(9.) The complainants' claim rests, for one of its necessary foundations, upon the idea, that while this mortgage is

confessedly made to the State of Tennessee as mortgagee, and while confessedly the State had a pecuniary interest in the security, in its own right and for its own benefit, to the whole extent of the amount secured by the mortgage, and it was greatly to its interest that it should be entitled to control and deal with the mortgage security from time to time as its own sense of its own interest might dictate, with a view of guarding itself against loss by reason of its loans of the bonds in aid of the internal improvements to be made by the railroads, and that its power so to control and deal with its security should not be fettered by any interfering rights of its own bondholders, and although, *under the statutes existing when the Internal Improvement Act was passed, and the issues of bonds under it previous to the war were made*, the bondholders could have *no practical interest in* or concern with the mortgage security, *unless in the event* (not then in the smallest degree in the contemplation of the State, the companies, the bondholders, or any one else) *that the State should either become insolvent, or repudiate the bonds for the payment of which it pledged its faith*—yet, notwithstanding all these considerations, this statutory mortgage is to be so construed by *implication merely*, and without a word in the statute indicating any such real intent, as to defeat the State's title to the mortgage as one held in its own right, and subject to its own control and management at its discretion, and to make the State's holding of the mortgage merely a holding as trustee for its bondholders, subject entirely to their control, and subjecting the State to the disability to do anything in the way of modification or rearrangement of the security, or in the way of prudential dealing with the debtor as it might deem advisable for its own interest in case of the debtor's falling into embarrassment.

In answer to the positions thus assumed by the complainants', we submit to the Court these propositions:

1. Clearly, this mortgage should be construed with reference to, and so as to carry out *its presumed intent* upon, the point in question—of holding the mortgage in its own right,

or holding it as a mere trustee for the bondholders—and such intent, is to be judged from the standpoint, of the State's condition of solvency, strength and unquestioned credit, as it was in 1852, when the Act of 1852 was passed, and not in the light of the utterly different conditions in which it was placed by reason of the wholly unexpected occurrence of the war, or which it finally assumed a quarter of a century after the act, under the influence of a party of repudiators among its citizens.

2. Although we do not deny that a sovereign State may, if it so chooses, assume the position of a trustee of an express trust, for the benefit of third parties, whether its own creditors or others, no such trust can legally be implied, and especially, no such trust can be so implied in such a case as this.

Such a trusteeship of the State for its creditors is in derogation of the dignity of the sovereign, and, therefore, is never to be *implied* as against the State.

When, notwithstanding the clear indication and expression of proprietorship of the lien in question by the State of Tennessee, which the statute contains, and in the absence of a single expression indicating a right to the lien on the part of the bondholder, it is proposed to interpolate into this statute the important words which shall divest the State of Tennessee of ownership, and makes it a trustee for others, and especially when the idea of doing so never occurred to any one until nearly thirty years after the statute was passed and the transactions under it took place, they being perpetually recurring, it is highly incumbent upon those who assert the right thus to interpolate these words into this statute, or into this mortgage deed (for such in substance it is), in derogation of the apparent right which the mortgage give to the mortgagee, to make a very strong case, before the court can be asked to do any such thing. You are not to make implications against the State. It seems to be assumed by our adversaries that our contention is, that it is incompetent for the State, as a sovereign power, to make itself subject to a trust, creating a specific security to

its creditor for a debt which it creates. We claim nothing of the kind ; but we say that there is *no implication of a trust, as against the sovereign power.*

The *presumption* of law is not, and cannot be, that the source of the law, the *sovereign, was either bankrupt, or in contemplation of bankrupty,* nor that it *intended* to *create a specific security to its* creditor *beyond the pledge of its public faith and credit.* That is our point. The requirement of such specific security is *in derogation of the dignity of the sovereign,* and all the presumptions are against it. When you find a sovereign power proffering the pledge of its faith and credit for a debt which it contracts, the presumption is that the security thus plighted was deemed all sufficient, and was so accepted ; and he who claims that, *by implication,* there was superadded a collateral security for the plighted faith of the sovereign power, is bound to show it distinctly and clearly. All implications are the other way. We are not to be misled upon this point by the citation of authorities in which a sovereign has chosen to waive his prerogative. We all know the sovereign power has many prerogatives which it may waive or not, as it pleases. The sovereign is not within the Statute of Limitations. Laches are not imputable to the sovereign. There are various other prerogatives of like general character which the sovereign has; and any or all of them the sovereign may waive at pleasure ; but, until such waiver comes and is distinctly shown, the prerogative exists in full force and effect.

Summary of our reading of the Language of the Statutory Mortgage.

Having reference to what has been before said in our arguments upon the various operative sections of the statute in detail, and in relation to the general scope and purpose, and real intent and meaning of the statutory mortgage, we will now give a summary of the reading and effect of the language of the State, as we read and construe such language.

That summary of the reading is as follows:

The issuing of the bonds shall, by force of their acceptance on loan by the company under the terms of this act, and without the execution by the company of a mortgage deed, constitute a lien by way of mortgage from the company to the State of Tennessee, upon the company's railroad and other property, for the payment by the company to the State, as hereinafter provided, of the amount of the principal of the bonds so loaned, together with the interest accruing thereon, which payments, in respect of the interest, shall be made by the company to the State, at the City of Nashville, Tennessee, through the Bank of Tennessee, as the State's fiscal agent, fifteen days before the interest will become due from the State to its bondholders, and to such payments shall be added the amount of the exchange and commissions to which the State will be subjected, for remitting the funds to New York, where its interest is payable, and for making the interest payments to the State bondholders through a bank or banker at New York, and which payments in respect of the principal shall be made by the company to the State in Tennessee State bonds of any class or kind, at their face or par value, in successive annual installments, commencing five years after the completion of the company's railroad, which payments in State bonds shall be credited by the State to the company on account of its indebtedness for the principal of the bonds so loaned, and if, at the maturity of the State's bonds, there shall be any balance of the company's indebtedness for the principal not paid and satisfied to the State by the credits to it for the said annual installments of principal paid in State bonds, the company shall, at such time of maturity of the State bonds, pay to the State such balance of its indebtedness to the State for the bonds so loaned to it, and in default of such payment of such remaining balance of principal, the State shall be entitled to collect the same by the foreclosure of the mortgage and sale of the mortgaged premises. In case of default by the company in making any of the semi-annual interest payments above required to be made by it to the State, the State shall be entitled to collect the same,

by means of the appointment by the Governor of a Receiver who shall take possession of the road, run and manage it, and receive the earnings, until the net earnings thus realized shall be sufficient to pay the amount of the interest due by the company to the State, which amount of interest so collected the Receiver shall pay into the State Treasury.

In case of default by the company in making payments of any of the annual installments on account of principal above required to be made by it to the State, the State shall be entitled to collect the same, either by means of receivership of the income, as above provided in respect of non-payment of interest, or by means of foreclosure of the mortgage and sale of the mortgaged premises, as above provided in case of the company's non-payment of the balance of principal remaining due at the time when the State bonds shall mature.

The State shall be entitled, at its discretion, to prescribe and enforce upon the company such regulations and obligations in respect of the security and satisfaction of the company's indebtedness to the State for or in respect of the principal of the bonds so loaned to it, and such modifications and readjustments from time to time of the methods and periods for the periodical payments to the State on account of the principal, as the State shall from time to time deem necessary for the protection of its interests and to guard itself against any loss by reason of making such loan of the bonds, provided always that such new regulations and obligations imposed by the State, and such modifications and readjustments made by the State from time to time as aforesaid, shall be such as shall not impair the vested rights of the company's stockholders.

If this be in substantial effect a correct summary reading of the mortgage, it will be admitted that the complainants' claim here made against the companies is without foundation.

We submit with entire confidence, upon the considerations which have been above set forth, that this is a correct reading of the mortgage, and that it is in complete harmony as well with the actual language used as of the plainly evident intent and meaning.

Practical Construction.

We now desire to lay before the Court the evidence which shows with perfect clearness, and without contradiction, that from the time of the first issuing of State bonds to the Railroad Companies under the Internal Improvement Act continuously until shortly before the commencement of these suits in 1879, that is to say, for a continuous period of about twenty-five years, there was *an uniform practical construction* by all the parties concerned, viz., the State, the Railroad Companies and the State bondholders, of the statutory mortgage in question, and the rights and relations of the respective parties under it, in complete conformity with the construction which we give, and the grounds we assume in this controversy, and in absolute contradiction of, and departure from, the construction claimed by the complainants and the grounds which they assume.

Before proceeding to exhibit this practical construction or the evidence of it, we will make some remarks upon the legal effect of such acts of practical construction, when there is cast upon a Court the duty of giving construction to the language of a statute, or the language of a contract, in respect of the meaning and effect of which there appears to be room for discussion or doubt.

We can hardly deem it needful to cite authorities for a principle so well settled and of such frequent application, as well in the case of statutes as in the case of contracts.

Even in regard to statutes it is well established that practical construction, especially if long continued and constantly acted upon, will, in case of reasonable doubt upon their language, have great and almost determining weight in determining the construction of the court, in accordance with that which has been long practically adopted and acted upon, and, oftentimes where a contrary action would lead to practical injustice, such acts of practical construction are allowed to give a legal construction to the language, which, apart from such practical construction, they would, not fairly bear.

Where the question is upon construction of a contract the same rule applies, and with greatly increased force. It is, of course, perfectly competent for the parties to a contract, to give by their concurrent acts to that end, such construction to the contract as they choose to agree upon, although, it may clearly be one which the language of the contract itself would not bear, and there is, of course, very much greater freedom of action in this respect than exists in the giving of construction by individuals to the acts of the law-making power, which is of paramount authority.

With reference to this question of practical construction, the complainants' counsel cited in the Circuit Court some authorities adverting to the danger of allowing constitutional restrictions upon power to be fritted away, by means of the exercise of the power for a period without challenge. We certainly appreciate the soundness of that view. We should say that there could be few things more dangerous than to allow the mere usurpation of a power; not existing under the constitution, to create that power; or the violation of a restriction to dispense with the restriction. Certainly that must be so, where the question as to the restriction or the power arises upon the fundamental law of the land, and, to a certain lesser extent, perhaps, where it arises under a statute. But this is not at all a case of that sort.

The question at issue here is not, in substance and effect, a question of the construction of a constitution, nor even of a law, where there might be made the objection to the allowance of the effect of the practical interpretation, which the counsel have referred to; but it is, in substance and effect, a question of the construction of a contract—a mortgage. The exercise of governmental power of the State of Tennessee, in enacting the Act of 1851–2, was extremely limited.

In declaring, in modification of the general laws of the State, that a mortgage might be created by an act *in pais*, instead of by deed, it did exercise govermental power. In declaring that all persons should be chargeable with notice of the statutory mortgage thus created, in variation of the general recording acts of the State, it exercised govern-

mental power. And, so far as respects any question now at issue, there was not, so far as we can see, any exercise of governmental power, proper, in any other part of the transaction. They created a mortgage by statute instead of by deed, The mortgage thus created, we all agree, was a contract, and the questions of construction upon which we differ, are merely questions of construction of that contract, which was a matter of private business interest, and not a question of public law or of public policy, or anything of that sort.

If, under the act in question, the State bondholders were entitled by virtue of the condition of that mortgage, to claim for themselves, as against the State, a lien, they certainly might waive it. There certainly is no difficulty whatever in giving the fullest effect (by way of bar to the private rights now sought to be set up), to the contrary act of the parties themselves, or of their predecessors in interest. Whatever force there may be in the proposition of the complainants' counsel that "there is no equity against a statute," it is wholly inapplicable to this question. The court are to determine the questions arising upon this mortgage made by a statute, just as they would decide them upon a mortgage deed made in the terms of the statute; and are to give the like effect to practical interpretation by the parties concerned, in the one case, as they would in the other.

Now, to proceed with the acts of practical construction, upon which we rely.

It is distinctly proved by numerous witnesses, wholly uncontradicted, and established by the testimony in the case beyond possibility of controversy, that the Tennessee State Bonds issued to the different Railroads Companies under this act, as well upon their original sale or negotiation by the Railroad Companies as in their subsequent sale and negotiation and passage from hand to hand in the ordinary channels of business, from the time when the bonds were first commenced to be issued under this act up to the time of the institution of this controversy in the year 1878—*a period of more than twenty-five years*—were *always* sold, negotiated,

dealt in and regarded, as being *purely and simply State bonds, and nothing else*, and without any idea being entertained by the buyer, or the seller, or by any one connected with the transactions, that they were accompanied by any mortgage lien upon a railroad; and, that these six per cent. bonds issued to the Railroad Companies under the Internal Improvement Act and negotiated and put in circulation by the Railroad Companies which received them, *invariably sold in the market at precisely the same prices as the Tennessee State Bonds issued for the State's own purposes, e. g.*, for raising the capital for its State Bank, for the building of the State Capitol, purchasing the Hermitage, and other purposes in which the State alone was interested, and in respect of or connected with which bonds there was no possible lien or suspicion of a lien of any kind in favor of any one.

It appears with equal clearness that many of the Railroad Companies which received aid in State bonds under this Internal Improvement Act, became insolvent; their roads proved to be poor investments and of extremely little value, and if a lien upon them had existed in favor of the bondholder, after the State's credit became destroyed and its means greatly impaired by the calamities incident to the war of the rebellion, such mortgage lien would have been of very little value to the bondholders, while, in respect of the mortgage bonds loaned to certain others of the railroad companies, *e. g.*, the Louisville and Nashville Railroad Company, &c., and others, the mortgage security, if it existed in favor of the bondholder, furnished a perfectly ample security for the bond, wholly irrespective of the liability of the State; yet that in practice, the bonds which had been issued to the solvent and insolvent companies respectively, always sold at precisely the same price, without variation of even the minutest fraction, and that, in point of fact, no knowledge or information was possessed by the State bondholders, or by any one else outside of the immediate circle of State officials, as to what particular railroad any particular State bond which was in circulation had been loaned to, until such information was given to the public in a certain report which the Comptroller of the State of Tennessee made in the year 1875; in certain schedules of which report, containing a complete statement of the out-

standing State bonds, with their numbers and the purposes for which they were respectively issued, this information was found.

It is further proved that such was this absolute uniformity of price and generally understood uniformity of value and security, in respect of six per cent. Tennessee State bonds, whether issued to railroads under this Internal Improvement Act or isrued for the State's own purposes, pure and simple, that by the uniform course of business prevailing on the New York Stock Exchange, where was and always has been the chief market for these bonds, contracts for sales of Tennesee six per cent. bonds were made at the market price, whatever it might happen to be, for Tennessee State bonds generally, without any designation as to the character of the bonds, *i. e.*, whether bonds which had been loaned to railroads, or bonds which had been issued for the State's own purposes, which should be deliverable in fulfillment of the contract, and that the purchaser under such contract of sale never knew until the bonds came to be delivered to him what kind of bonds would be so delivered in fulfillment of the contract, bonds of either class being a good delivery, and no one, in fact, undertaking to make, or supposing that there existed, any substantial distinction between them, or any difference in their value or security.

The fact further appears in the testimony of C. Amory Stevens, who is the file leader in this assault upon the Tennessee railroads, and who was originally the sole plaintiff in all these suits (the other parties having been brought in as co-plaintiffs by amendment), that this is *a mere speculation on his part*, entered into by him in the year 1878, many years after the liens had been discharged by the State upon full consideration received by it from the railroad companies, and with the acquiescence at the time of the State bondholders, and of every one else.

It appears that in the summer of 1878, after some one had revealed to him the chance of a speculation of this character, he commenced buying up Tennessee State bonds for the purpose of making this claim against the railroads; and that those of such bonds which he bought at the Stock Exchange he acquired for *precisely the same price* that he would

have been required to pay for Tennessee bonds, pure and simple, in respect of which there was no pretence of lien upon any railroad, and that as to the bonds which he acquired for the purpose of these speculative law-suits, by bargaining outside of the Stock Exchange, he, in large measure, acquired them by inducing holders of bonds bearing such numbers as that he considered they had attached to them a lien upon valuable railroads belonging to solvent companies, to exchange the same for what he regarded as *non-lien* bonds, *i. e.*, bonds not issued to railroads, *in consideration of some very trifling payment made as a consideration for such exchange*. He *does not pretend* that the *highest price* he ever paid by way of bonus for accomplishing these exchanges, of what he calls lien bonds for what he calls non-lien bonds, *was more than three per cent.*, and he admits that the bonus paid *ran from that all the way down to one-eighth of one per cent;* but for how many of the bonds he paid more than the minimum of one-eighth of one per cent., we have no means of knowing; and he refused utterly to disclose.

The very act of the sales to Stevens of the bonds which he bought at the Stock Exchange, at the current price of Tennessee State bonds, pure and simple, not secured by a lien on a railroad, was an act of practical construction by that vendor of the contract or statute under which it is now said his rights were created; and each and all of the hundreds of thousands of such transactions, from the year 1852 down, was a like act of practical construction, as between the buyer and seller, upon that transaction.

But we have acts of practical construction of still more striking force than these. In the year 1861 the State of Tennessee, overwhelmed by the calamities of the war, wholly stopped paying interest upon its debt, and became substantially insolvent. Some of the railroad companies who had received loans of State bonds under this Internal Improvement Act, especially the Louisville and Nashville Railroad Company, still maintained their business position and credit, paying regularly their current liabilities. From the time in 1862 when Nashville and its vicinity passed into the possession of the Federal forces, the courts of justice

there were open and accessible to suitors such as the holders of these State bonds. From the time of the close of the war, all thecourts of justice were open throughout the State of Tennessee, and *all these railroad companies, except the insolvent ones*, were carrying on their business and accessible to any demand for payment of interest upon these State bonds, if they were debtors for such interest.

By way of practical construction by the State bondholders of the statutory mortgage in question, and as conclusive of their understanding upon the question, whether it was or was not the duty and obligation of the Railroad Companies to make direct payments to the holders, of the unpaid coupons on the Tennessee State bonds, which had been loaned to them, we have the admitted fact that, notwithstanding the State of Tennessee remained wholly in default on her interest, excepting a small amount, which she paid in 1866-7, and the current interest for eighteen months, which she paid after the Funding Act of 1873, so that the interest on these bonds remained unpaid to their holders—during this entire term, up to January, 1879, when the raid upon the Tennessee Railroads was commenced by Mr. Stevens, *there was not one solitary instance in which any Railroad Company ever paid any coupon upon any State bond to any holder, nor one solitary instance in which any holder of any Tennessee State bond ever asked any Railroad Company to pay it.*

This important fact is admitted by the stipulation contained at pages 1194, 1195.

One would have supposed that the task of establishing the concurrence, by so vast a body of persons in interest as this whole body of Tennessee State bondholders, in a particular construction of the statute, would be a Herculean task, and one might suppose, *a priori*, that it would be impossible to accomplish it; yet, it so happens that we are enabled, by the peculiar circumstances of the case, to establish, by evidence so clear that no man can doubt it, that each and every successive holder of those Tennessee State bonds, up to the time when Mr. Stevens initiated his raid, gave in his prac-

tical adhesion to the construction of this statute and statutory mortgage which we now maintain. The doctrine of practical interpretation is beneficial enough and sensible enough in ordinary cases, but, when you come to add the circumstance that, by reason of the concurrent practical interpretation, certain of the parties to the transaction have been led to do things involving enormous pecuniary amounts, say twelve or fourteen millions of dollars, which unquestionably they never would have done except in reliance upon such being the true construction, no Court can properly permit the parties who, by thus giving in their adhesion to the particular construction, have led the other parties to such course of action, to reverse, ten years afterwards, the construction, and thereby overset entirely the acts done upon a basis which all parties at the time agreed upon as being the true one, and thereby inflict an enormous loss upon the parties who have been led thus to deal.

The evidence of the understanding and practical construction of all parties concerned, as to the obligation imposed under this act upon the railroads, in respect of the semi-annual interest falling due from time to time upon the amount of bonds loaned to them by the State, is complete and undisputed; the railroad companies never undertook to make, and were never called upon by the State to make any payment of interest to the State bondholders. The Bank of Tennessee was furnished by the State officials, semi-annually, with a statement showing the amount payable by each Railroad Company to the State for the interest on the bonds loaned to them; the Railroad Company paid such amount to the bank as the State's agent, and took a receipt for it in discharge of so much indebtedness of itself to the State; *the bank passed the money thus received to the credit of the State*, carrying it ultimately to the same account as it carried money received for taxes, and other moneys belonging to the State. The bank never had any statement from the State, the Railroad Company, or any one else, by which it could know that the money it received from any particular Railroad Company was to be applied to the payment of the interest on any particular bonds. The

bank, in virtue of a law passed prior to the act of February 11, 1852, and remaining in force up to the war, was required to act as *the agent of the State treasurer* for the payment of the interest upon the State bonds falling due in New York and Philadelphia; the interest upon the State bonds which are in question in this litigation was payable in New York, and the Bank of Tennessee, through its correspondent bank in New York, paid the interest on the bonds which had been loaned to the Railroad Companies in common with interest upon all other outstanding bonds of the State, without undertaking to make, and without having any means for making any distinction between interest on the bonds issued to any particular railroad, or to the railroads in general, and other bonds of the State bearing the like rate of interest falling due at the same time. All the interest coupons which the Bank of Tennessee thus paid for the State through its correspondent in New York were returned to it by the New York bank, and were by the Bank of Tennessee charged up to the general account of the Treasurer of the State upon the books of the bank, and were then surrendered to the State Treasurer to serve as vouchers, no discrimination being made in the course of the transaction in any respect whatever between the coupons on bonds which had been issued to a particular railroad, or to the railroads in general, and the coupons on other bonds of the State of like character in respect of rate and maturity of interest coupons. This was the uniform course up to the time when the payment of any interest at all was stopped in consequence of the war.

From the year 1861, as we have said, the interest on all the Tennessee State bonds remained in default. In the year 1862, that part of Tennessee which embraces Nashville passed under the domination of the United States Government, and so ever after remained, and the Courts were open for the enforcement of all civil rights. The Louisville and Nashville Railroad Company always maintained its payments and preserved its credit; there was outstanding a considerable amount of Tennessee State bonds, under this act yet no bondholder has ever even presented his coupon to a railroad company for payment; nor was there any practical assertion

in any form of any claim or pretence of claim against any Railroad Company for payment of the interest in arrear on the State bonds loaned to the railroads under this act until the commencement of this controversy by the institution of Mr. Stevens' nineteen suits in the month of January, 1879. In 1865 the Legislature passed an act for the funding of interest in arrear upon its bonds by issuing new bonds for the back interest. This act was put in practical operation, and every State bondholder without exception funded his back interest and received the new bonds for them, which certainly were not worth over about fifty cents on the dollar at that time, while in respect of such of the bonds as were liens upon the property of the solvent Railroad Companies, the full payment of interest was, if the plaintiffs' present construction of this act be correct, secured to the holder by a first mortgage security of unquestionable strength. In 1873 another act was passed for the funding of additional interest that had at that time accrued on the Tennessee State bonds, treating such interest as due by the State alone, and giving for it a new security which was far below par, and which, in respect of the bonds issued to the solvent Railroad Companies, it was a decided sacrifice to the holder to accept if the construction of the act in question, which is here contended for by the complainants, be correct; yet that act also was accepted and acted upon by the holders of the State bonds without exception, and under the same act the holders of the State bonds were required to and did bring in all their bonds to a State official for registration and certification, and they were so registered and certified, being treated by all parties as mere obligations of the State of Tennessee; and the State, by that Act of 1873, pledged its faith for the punctual payment of all the bonds so registered, including all the bonds which are now sued upon by these complainants, and undertook to provide in the hands of its treasurer the necessary funds for the payment of the interest on them.

The indisputable fact before adverted to, that from the year 1852 up to the year 1878 the Tennessee State bonds issued to the Railroad Companies under the act in question,

were invariably bought and sold at precisely the same price as the bonds of the State issued for its own purposes purely, and in respect of which there could be no possible idea of there being any lien connected with them, affords absolutely conclusive evidence of the understanding of the State bondholders on the question here in dispute, and that that understanding was utterly variant from and inconsistent with the position which is now taken by the complainants. And in this we have evidence, *not merely of the entertaining of an abstract opinion by the holders of Tennessee bonds, but of their practical action and dealings in matters of direct pecuniary interest, which* (assuming them to be governed by the ordinary motives of human action) could have proceeded upon no other basis than their assumption that our present construction of the contract in question is the correct one.

The contention of our adversaries is that these bonds were in legal effect direct first mortgage liens in favor of their holders upon the property of the Railroad Companies to which they had been originally loaned by the State. In the year 1861 the State of Tennessee defaulted in the payment of the interest upon its public debt, and it has continued in such default ever since, with the exception of the comparatively small amount of interest paid in or about 1866–7, and the regular payment of the current interest for a period of about eighteen months in 2874–5; and from the time of the default first made by the State in 1861 up to this day, the market price of Tennessee State bonds has varied, from time to time, under the influence of such considerations regulative of prices as were applicable alike to all the issues of State bonds, irrespective of any supposed or supposable mortgage lien of any of them upon any railroad or railroads, and under these variations the price of Tennessee State bonds appears to have ranged all the way from 26 per cent., or perhaps less, to 91 per cent. It appears in evidence that at the time of the passage of the first Act of 1869, which is here assailed as a wrongful and fraudulent proceeding, conceived and carried out between the Legislature and other public authorities of the State of Tennessee upon the one side, and the Railroad Companies upon the other side, the market price of Tennessee State bonds was about 41 per cent.

The theory of our adversaries being that these Tennessee State bonds, which had been loaned under the Internal Improvement Act, were specific first mortgage liens in favor of their holders upon the entire property of the Railroad Company to which they were respectively issued, it would follow, of course, in respect of such of the bonds as had been loaned to what was called the solvent railroad companies, such as the Louisville and Nashville and the Nashville and Chattanooga Railroad Companies, and divers others, the bonds were perfectly good and collectable securities; yet it is undeniable that the holders of these very bonds, when from time to time they made sales of them, invariably sold them at the price of unsecured Tennessee State bonds, however low that might be, and that in the numberless transactions which were constantly taking place, neither buyer nor seller ever imagined or supposed that the bonds were secured by any mortgage lien upon a railroad.

The plaintiff C. Amory Stevens is obliged to admit upon his cross-examination that the bonds which he now sues upon were purchased by him in the year 1878, at prices ranging, say, from 32 to 42 per cent., or thereabouts, the purchase carrying with it all the unpaid coupons, which, at the time of the filing of his bill, amounted to 18 per cent. on each bond, and amount now to over fifty per cent., and that in respect of all these purchases, which were made in the usual and regular course of business, he paid precisely the market price of unsecured Tennessee State bonds.

If it be claimed that in the *special transactions* made by Stevens, in which he paid the extra price of from one-eighth of one per cent. to three per cent. for what he calls lien bonds, there was introduced the element of a sale being made of these Tennessee bonds as being secured by mortgage lien upon railroads, and that Mr. Stevens had the right to buy a law-suit for any price, however small, the owner might choose to accept, we have to call attention to the fact that this performance of Stevens, occurring twenty-six years after the passage of the act, was absolutely the first instance in which any difference in price was made between buyer and seller because of any supposed difference in value of security between the bonds issued to the

railroad companies under the Internal Improvement Act, and Tennessee State bonds pure and simple; and this occurrence in 1878 was altogether too late to counteract the effect of the uniform practical construction to the contrary for a quarter of a century. We do not feel called upon to assert that the price paid by Mr. Stevens for this privilege of suing Tennessee railroad companies upon the claim now asserted was inadequate, but are willing to concede that the price of one-eighth of one per cent. in excess of the current market price of Tennessee State bonds pure and simple, was just one-eighth of one per cent. more than the value of the special thing he bought. In respect of all the bonds held by Stevens, except those which he admits to have been bought in 1878 for the special purpose of bringing suit against the railroads, there is no dispute that his bonds were purchased by him (or by his father, in respect of the bonds received by gift from him), and were sold by the vendors as being Tennessee State bonds, pure and simple, and not as being bonds secured to the holder by railroad mortgage lien; and this is true in respect of all the bonds held by the other plaintiffs, viz.: Geddes, Terry and Kelly. It is true that Mr. Terry does undertake to say that he, or rather his firm of E. D. Morgan & Co. (from whom he subsequently acquired his separate title), purchased in 1873 the bonds upon which he now sues, with the understanding that they were secured by lien upon the railroads, but he admits that he had no idea upon what particular railroad the lien was, whether a solvent or a worthless one, and that the bonds were all bought at the Stock Exchange at the current market price, at the time, of Tennessee State bonds, which he admits was alike for bonds which had been, and bonds which had not been, issued to railroads, and when he undertakes to describe what sort of railroad lien he supposed he was getting, he does it in terms which will hardly afford aid and comfort to our friends on the other side, for maintaining their position on his particular behalf. This evidence will be found on page of the record, as follows:

"Q. When your firm and yourself became purchasers of Tennessee State bonds, what security for the payment of

those bonds and the interest thereon did you believe you were acquiring by such purchase?

A. *I supposed the railroads would pay the amount into the State, and we should receive it from the State, the State making good any deficiency.*"

This would hardly answer the purpose of the plaintiffs.

From the outset, the State always *regarded* and *treated* this statutory mortgage lien as one belonging solely to itself, controllable and variable at its pleasure, and in respect of which the State bondholder had no interest or concern or right of interference.

As early as the year 1854, while the construction of the roads and the issue of the State bonds in aid of them under the Internal Improvement Act was in progress, the State of Tennessee, by its act of February 28, 1854, amendatory of the Internal Improvement Act of February 11, 1852, increased the amount of the State bonds to be issued to the Railroad Companies thereunder from $8,000 per mile to $10,000 per mile, the increased amount to be covered by the statutory mortgage on like footing in all respects, as the original amount; and this enlargement of the lien *by the concurrence of the State and the company alone, without the slightest reference to any assent or dissent of the holders of the State bonds already issued*, is a contemporaneous exposition of the understanding and design of the State in relation to the nature, effect and ownership of the statutory lien under the Act thus amended, and clearly evinces that such lien was regarded as one belonging solely to and within the control of the State, and in respect of which the State bondholder had no rights or interests; and every one who, after the passage of the Act of February 28, 1854, became the purchaser of any Tennessee bonds issued under the Act of February 11, 1852, as thus amended had full notice, and must be deemed to have assented to the State's construction and understanding of the act, viz: that the mortgage lien taken by the State, was taken by and for the benefit of the State alone, with liberty to vary and deal with it as it might see fit, without any interest or right of interference by any of the State bondholders.

By the Act of February 21, 1856, the State increased the sinking fund installments to the State, on account of the principal of the indebtedness. from one per cent. to two per cent. per annum, thus hastening the time by which the whole principal of the indebtedness would be paid to the State and the mortgage lien therefor discharged, and providing for a sale of the mortgaged property for raising the amount of the sinking fund installments, in case of a failure of the company to pay them voluntarily, and by the Act of March 20, 1860, the State further increased the amounts of the annual sinking fund installments, and again altering the time within which the debt and the lien would be complete discharged, and by these as well as by subsequent changes made by the State in the sinking fund requirements, as appearing in the pleadings and evidence in these cases, the State has further and continuously evinced its understanding that the statutory mortgage belonged wholly to itself, and was subject to modification and detail in respect to its provisions and conditions at its pleasure. And all these actions on the part of the State have been uniformly and universally acquiesced in by the State bondholders. Not one word of complaint or objection to them was ever heard from any quarter.

The acts of 1869–70, which are now assailed with senseless clamor as being destructive of the rights of the State bondholders and involving a great wrong to them, were in fact passed with their acquiesence, and to a very large extent with their express concurrence, as is fully proved by the testimony of Governor John C. Brown, who was the Governor of the State at that time, which testimony will be found on pages 1143 to 1147 of the record.

The acts were intended to be, and in fact were, greatly in the interest and for the benefit as well of the holders of the State bonds as of the State itself, with certain incidental advantages to the Railroad Companies which should avail themselves of the acts for the purpose of liquidating their indebtedness to the State, which advantages it was absolutely necessary to give, in order to enable the Railroad

Companies at all to raise the means necessary to carry out the scheme; which scheme, in substance, was, the reduction of the State debt under the system established by the acts, to the end of placing the finances of the State in such condition as to enable it to resume the regular payment of its current interest, and, as was then believed by all concerned, thereafter continue its payments and maintain its credit. It is not only proved by the testimony of divers witnesses, but it is finally admitted by the agreed statement of facts on pages 1171 to 1173 of the record that, during the whole progress of the legislation embracing the acts of 1869–70 and of the liquidation, arrangements, and settlements authorized and required by it and the dealings between the different railroad companies and the State, and of the railroad companies in borrowing money on the security of mortgages on their property, on the faith that all prior liens on account of the loans by the State of internal improvement bonds had been thereby removed and discharged, "the facts were *public, and notorious,* and the holders of "Tennessee State bonds, in the year 1870, formed a volun- "tary organization, represented by a committee, for con- "sultation and co-operation in matters of common interest, "and kept themselves well advised of each step in the his- "tory of the business;" *that this committee ceased to exist in* 1873; that in 1877 a similar organization was formed of Tennessee State bondholders, and has been kept up ever since; "that at no time did the said holders of Tennessee "State bonds, or any one of them, including the complain- "ant, or those associated and acting with him in the prose- "cution of this and similar suits, ever make any demand "upon any railroad company for the payment of any inter- "est on the said bonds, or receive from any railroad "company payment of any coupon, or make any objec- "tion to any of the acts of the State of Tennessee, in "consistent therewith, or object to the passage thereof, or "oppose any payment, settlement and liquidation, by any "railroad company, or its indebtedness to the State, until "in May, 1877," when the question was *incidentally* raised in a litigation pending at Memphis, and then it was not raised directly by any State bondholder, but incidentally by one of the parties to the suit upon some questions involving the

marshalling and priority of liens, such party insisting that there still existed an outstanding lien on behalf of the holders of Tennessee State bonds which had been loaned in aid of that part of the Mobile and Ohio Railroad which is situated in the State of Tennessee, notwithstanding the State had parted with its lien by acts done under and by virtue of the Acts of 1869–70. This was nearly seven years after the East Tennessee, Virginia and Georgia Railroad Company had made settlement with the State, and by paying the full amount of its indebtedness in State bonds at par, had received from the State a full release from the statutory lien; it was some two or three months prior to closing of the transaction by which the State transferred its lien upon the Memphis and Charleston Railroad to the parties who paid the debt in State bonds and took an assignment of the lien under the Act of 1869. The raising of this question at this late day could not countervail the legal effect of the uniform concurrence for twenty years previously of all parties concerned, viz., the State, the companies and State bondholders, in the construction of the act, which during all that long period had been acted upon, and, moreover, even at this date, April, 1877, the question was not raised by any one having a direct interest in it, but merely suggested collaterally by way of embarrassing the claims of adversaries relating to distinct and independent matters; and the claim then set up, of the construction which is now asserted by these plaintiffs, met no countenance from the court before whom it was then asserted, but was promptly overruled.

We have adverted above, so carefully, to the acts of the State bondholders which established *their* concurrence in the construction which is now maintained on our side, because the State bondholders are the only parties in respect of whom the plaintiffs' counsel could *possibly* dispute, concurrence in this construction. That the State had at all times, from and after the Act of February, 1854, distinctly declared by its legislative acts its understanding and construction of the act to be such as we claim, is too evident for dispute, and for proof of this we have only to refer to the Act of February, 1854, enlarging the lien from eight to ten thousand dollars per mile, and of course thereby diluting the mortgage security of the holders of the then

outstanding bonds that had been issued under the Act of February, 1852 (if it could have been supposed that those bonds had any legal right or interests in respect to the security), without asking the consent of such bondholders to the measure, or in any way referring to them as parties in interest, to the Act of March 20, 1860, which proceeds upon the basis which we now maintain in the most unmistakable manner, and which in direct terms relieved the railroad companies from the obligation of thereafter paying interest upon such portion of the amount of bonds issued to them under the act as had been or might be satisfied by the companies to the State, through payments into the State's sinking fund, of bonds other than those which had been issued to the particular company, notwithstanding a corresponding amount of bonds issued to such particular company would remain outstanding as against the State in the hands of their holders; to the various acts passed by the State after the war and anterior to the legislation of 1869–70, plainly proceeding upon the like basis and construction, but which it seems not worth while here to refer to in detail; and to the Acts of 1869–70 themselves; all of which legislative acts of the State *remained wholly unchallenged by a single railroad company or a single State bondholder*, until after the consummation of the last of the transactions under which the State liens upon the property of my clients had been released or transferred, and had in fact met the complete assent or acquiescence of the companies and the State bondholders without exception.

Upon this recital of facts it plainly appears that at the time of the consummation of the transaction between the East Tennessee, Virginia and Georgia Railroad Company and the State of Tennessee in June, 1870, there had been for some eighteen years, or thereabouts, an established practical construction of the statutory mortgage and the act creating it, by the uniform concurrence of the State, the companies, and State bondholders. In reliance upon this practical construction as matter of fact, as well as in legal reliance upon their own opinion of such construction, the East Tennessee, Virginia and Georgia Railroad Company entered into the transaction with the State in June, 1870,

whereby they paid to the State, and the State accepted from them, in satisfaction and discharge of their indebtedness to the State of Tennessee, State bonds to the amount of $3,835,000, besides $282,750 of past due coupons on such bonds. This $3,835,000 of State bonds had cost the company in cash 55 per cent., and the bonds, at the time when they were thus delivered to the State, had a cash value in the market of some 61 to 63 per cent. The plaintiffs' claim in this suit is, that the construction of the act, in reliance upon which the East Tennessee, Virginia and Georgia Railroad Company paid over to the State these bonds of the then cash value of over $2,300,000, shall, notwithstanding the concurrence of all parties in interest, including themselves or their predecessors in interest who were then the holders of the bonds which they now hold, be completely reversed, and a contrary construction adopted, which shall render wholly nugatory and worthless the release and discharge of the statutory mortgage lien, which was the sole consideration for the delivery to the State of the bonds of this, then, very large value, and the only mitigation of the loss which would be thus inflicted upon this Company by the reversal of the construction which, at the time of the transaction is question, had for so long been and then was universally recognized and acted upon, which the plaintiffs can suggest, appears to be, that we shall get back the bonds which we delivered to the State, if we can find any way of doing it, and that as to the loss consequent upon their fall in value from 61 to 63 per cent. at the time of the transaction to 27 to 36 per cent. at the time when the first word of complaint was heard from any State bondholder, viz. in January, 1879, we must bear it with such philosophy as we may. If we correctly understand the principles applicable in a Court of equity, or even in a Court of law, to transactions of such character under such circumstances, parties whose conduct, in acquiescense in a particular construction of a contract, has thus tended to induce particular action by another party concerned, in reliance upon such agreed construction, cannot be permitted to reverse their position and claim an entirely different construction of the contract at a period so long subsequent, and with the result of accomplishing so grievous loss and injustice.

SETTLEMENTS MADE BETWEEN THE COMPANIES AND THE STATE UNDER THE ACTS OF 1869–70 CAUSED NO LOSS OR INJURY TO THE BONDHOLDERS, AND THEY HAVE NO GROUND OR REASON, EITHER LEGAL OR MORAL, FOR COMPLAINING OF THESE TRANSACTIONS.

Complaint is made by the complainants that great injustice has been done to the State bondholders by the State, in those features of the legislative Acts of 1869–'70, which provide for the liquidation of the indebtedness of the Railroad Companies to the State, in a time and manner differing from the provisions of the original Act of 1852.

We trust we have before established, to the satisfaction of the Court, that the mortgage security provided by the Act of 1852, was a matter entirely between the State and the Railroad Companies, with which the State bondholders have not, and it was never contemplated by any one that they should have, any interest, concern or right of interference in any way whatever, directly or indirectly; but it may not be amiss to show, that in this respect there is no grievance of which the State bondholders can complain, *either under or outside* of legal principles.

We have before shown, that by the operation of the seventh section of the original act, the Railroad Companies were to make full payment to the State for the bonds borrowed from it, by the payment of yearly installments to a sinking fund established by the State, under such regulations as that the aggregate of such payments, with the interest to be allowed upon them under the operation of the sinking fund, would extinguish the company's obligation, and, thereby discharge the statutory mortgage, before the State creditor would have any right to call for his money; and, of course, before he could make any pretention to lay hold of or in any way interfere with the mortgage. Under the legislation of 1869 and 1870, *precisely the same thing* has been done, without impairing the position or the right of the creditor by a hair's breadth. *The time* of making satisfaction by the companies has been *somewhat accelerated.* The companies fell behind in the time of the earlier required payments to the sinking fund, by reason of the embarrassments consequent upon the war, and the parties have chosen

to accelerate the later payments, but it can make no possible difference to the State bondholder whether the mortgage security which he is now blindly seeking to grasp, was lawfully and effectually satisfied, and extinguished, *say ten or fifteen or twenty years before, or three years before, the period when he could have any possible pretensions to interfere for prevention or otherwise.* And the accelerated satisfaction of the Railroad Company's indebtedness to the State has been made *in precisely the same medium* under the Acts of 1869–70, as it was to have been under the original Act of 1852. If the satisfaction had been made in strict accordance with the seventh section of the Act of 1852, these payments of installments, on account of the principle of the Company's indebtedness, secured by the mortgage, would have been made, *not in money*, but in *Tennessee State bonds of any class*, which bonds, by the terms of that original act, the State was to receive from the company *at par* in payment of so much of the Company's indebtedness to the State. And, the whole amount, as well the original sinking fund payments as the accumulations, was to have been kept invested in Tennessee State bonds. And in respect, as well of the payments to be originally made by the Company to the State in satisfaction of the sinking fund installments, as of all subsequent investments and reinvestments of the sinking fund, the provision was for Tennessee State bonds, not restricted to Tennessee bonds issued to the particular railroad making the payment to the sinking fund, or issued to any railroad or railroads, but any Tennessee State bonds which might have been issued for any purpose. The accelerated satisfaction under the legislation of 1869–70, has been made in precisely the same medium, namely, Tennessee State bonds, and such bonds have been received and credited by the State *at par*, just as was provided in respect of the installments, payable in virtue of the seventh section of the original act. There has been no compromise or or abatement in respect of payment and satisfaction of this indebtedness, by the Company of the State of Tennessee. The whole indebtedness, principal and interest, has been paid to the State in its own bonds, at par.

If these particular bondholders, who are now plaintiffs, complain that the medium by which payment has been

made by the companies, puts no fund in the State Treasury which can be made available for their security, or for discharging the State's obligations to them, the short answer is—this is exactly what their position would have been under the working of the seventh section of the original act, and if they complain that the State, by way of creating a demand, or market price *for their particular bonds*, ought to have required that the Railroad Companies should pay in the identical bonds which they originally received, the same answer is obvious: there was no such requirement in the seventh section of the original act, and there has been no prejudicial alteration of the bondholders' position in that respect.

And now we desire to call the attention of the Court to the circumstance that by the terms of the seventh section of the original act, the companies were required to pay to the State their installments on account of principal of the debt, not in money, but in Tennessee State bonds, and the credit they were to receive for the payments thus made were to be, for the par or face of the bonds, and not for the amount of money which it had cost them to buy the bonds, and as we have before shown, at that time Tennessee State bonds bore a premium, and this obligation to pay in State bonds instead of money would necessarily involve a loss to the companies, supposing the then condition of things as to the State's credit and the price of its bonds to remain as it then was. Of course, it was quite right and proper that this loss should be borne by the companies and not by the State.

On the other hand, it was clear enough under the terms of the bargain of the act, that if the market price of the bonds should at any time fall so that the companies could buy at a discount the bonds they were required to pay to the State in reduction of the principal of their indebtedness, the company would necessarily and properly gain the amount of such discount.

The *contract method of reimbursement* of our debt to the State created by the loan of these bonds was ITS PAYMENT

BY INSTALLMENTS BEFORE MATURITY IN STATE BONDS AT PAR, and if there had not come a war, which certainly was not within the contemplation of the parties to this transaction when it originated, there is every reason to suppose that the six per cent. bonds of Tennessee, which, if the statute of 1852 had remained unaltered, the companies would, under the provisions of that act, have been forced to pay in at par, they would now be required to buy for the purpose at a premium of probably not less than twenty per cent. Any one acquainted with the matter knows that he cannot now buy the six per cent. bonds of the State of New York, or of the State of Massachusetts, or of the United States of America, having any considerable time to run, short of 120 per cent. Such was the obligation to which we subjected ourselves by the terms of the original act. We received a loan of Tennessee State bonds; and, if things had remained unaltered, it would probably have cost us $1,200 to repay each $1,000 of our loan. Then came the war, with all its train of calamities, not only to the State of Tennessee and to her people, but to her railroads. Perhaps the railroads, which became in turn the prey of the contending armies, suffered in proportion more than any other kind of property; for, whenever the forces of one party happened to be in possession of those important avenues of communication and transport, and perceived that they were about to be pushed from them, they, in pursuance of the ordinary rules of war, spoiled them, as far as they could, just as retreating armies spike the cannon which have to be abandoned to the enemy. The termination of the war found these railroads with burned bridges and torn up rails, in a state of dilapidation which was really discouraging; and now this arrangement between the companies and the State, which is said to be so inequitable, this "swindle" that the railroad companies are said to have perpetrated, is that, in pursuance of the terms of the original contract, they have paid their debts to the State in State bonds at par. If there had been no war they would not have met the losses of the war, and it would have cost them 120 per cent. to repay the loan. There came the war. They have suffered the losses of the war; and pursuing ex-

actly the terms of the original contract, they have paid their debt to the State in State bonds at par, which, perhaps, cost them, upon an average, sixty per cent. If some one would come and make up to the Railroad Companies one-third of the losses of the war, I fancy they would refund to that party, stranger or not, with the utmost cheerfulness, much more than all the profits they have made in buying up State bonds and paying their debts in the medium of payment originally provided by the contract.

COMPLAINANTS' RIGHT, IF ANY, MERELY THE EQUITABLE RIGHT OF BENEFICIARIES OF A TRUST, TO DISAFFIRM ACTION OF TRUSTEE, AND IS LOST BY ACQUIESCENCE AND DELAY.

We have now to present another specific proposition which, although proceeding to a certain extent upon like principles as those just referred to above, yet rests upon a different and distinct principle, as follows:

If it be assumed that the plaintiffs are correct as to the true original legal construction of the statutory mortgage in question, and, if it be held that the legislative Acts of 1879–70, and the transactions between the State and the Companies under those acts were of such character as to entitle the plaintiffs to impeach and set aside the releases thus given by the State to the Companies, it is very certain that such rights of the plaintiffs is *no more than the right of beneficiaries to impeach and disaffirm at their election the acts of their trustee* as being acts transcending the trustee's powers or violating the trustees duties towards them. The release which the company has obtained, is a release upon full and valuable consideration granted by *the holder of the legal title to the mortgage lien.* Granting that such release may be impeached by the beneficiaries. still it is *not void*, but *merely voidable if the beneficiary so selects;* and, it is a well-settled principle of equity law, that where the beneficiary of a trust has such election to avoid and set aside the act or deed of the trustee, done or given in a transaction with a third person, as in exercise of or under claim of being in exercise of the trustees' powers, the *beneficiary must exercise his election to disaffirm with reasonable and due diligence, and if he fails to*

do so his right of disaffirmance is thereby terminated. If he fails to say "nay" in due season, the law deems him to have said "yea," and assent or acquiescence thus appearing has the like effect in a Court of equity as the express assent of the beneficiary given at the time of the transaction. It is likewise a well-established rule, that in determining whether or not the disaffirmance has been declared by the beneficiary with due and reasonable diligence, the law has regard not merely to the time, in days, weeks, months or years, but likewise to changes of circumstance, which may have occurred; and as a general rule, unless the lapse of time has been very short, the fact that circumstances have so changed in the interval, as to render disaffirmance materially more prejudicial to the parties whose transaction is sought to be annulled, than it would have been if the disaffirmance had been declared promptly after notice, presents as strong ground of objection against the exercise of the right of disaffirmance as a greatly longer lapse of time without such change of circumstances.

Another rule is inflexibly applied in such cases by courts of equity, that where the transaction, in respect of which the right of disaffirmance exists, is of such character as at the time of transaction or of the beneficiary's coming to knowledge of it, to leave it doubtful whether in the end, it will be most for the interest of the beneficiary to affirm or disaffirm; *e. g., where the result will depend upon rise and fall in price or value of the subject matter involved,* the law *will not permit a beneficiary to lie by and speculate upon the chances;* he cannot play fast and loose, and keep himself in a position where he can disaffirm if the unknown and unknowable event shall turn in one way and affirm if it turns in the other; and where his conduct indicates an intention thus to gain an unfair advantage by holding in suspense his right of disaffirmance, he is held thereby to have totally lost such right. Let us now apply these general principles, which we think will hardly be disputed, to the facts of this case.

We have said before that these acts of 1869–70, and the transactions between the Company and the State under them, are now assailed with senseless clamor, and fully realizing that it becomes us to point out the reasons for thus characterizing the action of our adversaries, we proceed to

do so. It is assumed by the complainants that the scheme of the acts of 1869-70 for the settlement, as far as might be, of the Railroad Companies of Tennessee to the State by their payment in full in State bonds at par, was a wrongful act, tending, and by the parties understood to tend, to the prejudice of the State bondholders, and that in these acts and the proceedings of the State and the companies under them, there is found a fraudulent plan for sacrificing the just rights and interests of the State bondholders, and that the bondholders were either ignorant of, or powerless to avert it. For these assertions there is no foundation whatever. We have before referred to the evidence and the agreed statement of facts, showing that the bondholders had full acquiescence with the acts and transactions in question at the time of their occurrence, and never lisped one word of complaint or objection until the happening of unexpected events many years afterwards. But beyond this, it is proved by the testimony of numerous witnesses, that the scheme of these acts met the distinct approval and active concurrence of the great mass of the State bondholders who interested themselves upon the subject; for proof of this we refer particularly to the testimony of John C. Brown, who was the Governor of the State of Tennessee for four years, from 1871 to 1875, inclusive.

Record, pages 1143 to 1147.

Now what was this scheme, which the complainants denounced as unjust and fraudulent. In consequence of the calamities incident to the war, the State of Tennessee had been wrecked in her credit and in very large measure in her resources and ability to meet her engagements, and she had at the time of the Act of 1869 an aggregate State debt of over forty million dollars, and her railroads also had been subjected to enormous depreciation and losses by the events and consequences of the war, and the general scheme of the legislation of 1869-70 was to reduce the State's indebtedness, and bring it within reasonable compass, *so that she might be enabled to resume payment of her interest*, which, without the large reduction of her debt, was considered impracticable; the State bonds being then largely depreciated in market by reason of the misfortunes which had happened

alike to the State and her citizens and the Railroad Companies, it was deemed desirable that some course should be adopted, by which the so-called solvent railway companies should be enabled to raise, from capitalists at the North, a sufficient amount to enable them to buy up and surrender to the State an amount of State bonds equal to their indebtedness to the State. It was, of course, foreseen that the demand for State bonds that would naturally be created by the required purchases of the Railroad Companies carrying out the scheme, would tend to advance their price, thus benefiting the then holders of the State bonds, yet still it was supposed that the immediate rise of price might not be so great as to put the accomplishment of the transaction beyond the ability of the Railway Companies, with such aid as they could obtain from northern capitalists, substantially upon the basis of substitution to the State lien. The objects and motives and expectations of the parties concerned in this scheme are set forth with some care in the answer of the East Tennessee, Virginia and Georgia Railroad Company, some portions of which we will here quote, as follows:

"And this defendant saith, it is true that during the late "Civil War, the Railroad Companies did not generally pay "the interest on the amounts of the bonds issued to them, "and after the war they still continued, in great part, in "default in making the payments due by them to the State "on account of such interest, and the State of Tennessee, "during the same period, likewise had been and was in "default in paying the interest on its bonds, and the market "value of the State bonds had fallen very greatly, and the "value and market price of the State bonds had become, "and was very much depreciated; such depreciation varied "greatly and with wide fluctuations, the market price at "times being considerably below, and at other times con-"siderably above, fifty per cent. And this defendant saith "that the events of the war had inflicted enormous losses "upon the State of Tennessee and upon its people; and "besides and apart from the depreciation of its railroad "interests and claims, had greatly diminished the resources "and means of the State, and the ability which it would

" otherwise have possessed to meet its obligations to its " creditors; and that the Railroad Companies which had " respectively received the loans of the State bonds under " the Internal Improvements Acts, had, by the events of " the war, sustained enormous losses and depreciations of " their property; and the events consequent upon the war " had also greatly depreciated the comparative business " and profitableness of their railroads; and the roads them- " selves, and their bridges and other appurtenances and " equipments and materials had, amidst the conflicts of the " contending armies and under the spirit of lawlessness " thereby engendered, become greatly dilapidated, wasted, " injured, and, to a large extent destroyed, so as to require " very large expenditures for rehabilitating them and putting " them in suitable conditon for profitable working, and to " make them efficient instruments for affording the facilities " for travel and transportation, required by the wants of the " community; and in the then condition of the companies " pecuniarily depressed, financially embarrassed and dis- " credited, it was as to the best of the roads ex- " tremely difficult, and to many of them utterly " impossible to obtain the funds or means necess- " sary for such expenditures, without relief in respect " of some portion of the indebtedness with which they " were loaded; and as to some of the poorer roads, it was " impossible to extricate them from embarrassment or make " them servicable instruments of travel or transportation " under their then organization and indebtedness, or to " make them available for practical value or working, short " of selling them out for what they might be made to bring " by enforcement of the liens against them.

" And at the time of the said legislation of 1869–70, the " bond debt of the State of Tennessee, including the accu- " mulations of unpaid interest, had become swollen to some " forty millions of dollars, or thereabouts, which was greatly " beyond the practical ability of the State to meet or then " satisfactorily deal with, unless some particular measures " of relief could be adopted; *and it was then greatly desired* " *by the State of Tennessee and among its people, that some* " *means should be devised for largely reducing the amount of its* " *indebtedness, and bringing the same within such compass as*

" *that it might be enabled as speedily as possible to resume pay-*
" *ment of its interest.*

" And under this state of things *it was regarded, not merely*
" *by the said railroad companies, but by the governing authorities*
" *of the State of Tennessee, and by the people of the State gener-*
" *ally*, as desirable that some plan should be adopted *for re-*
" *ducing the State debt*, by *inducing the Railroad Companies*, or
" such of them as could possibly command or obtain the
" means of doing so, *to pay up* and satisfy at once and with-
" out waiting for the full maturity of their legal obligations
" in that behalf, the amounts of their indebtedness to the
" State for the amounts of the State bonds which had been
" loaned to them under the Internal Improvement Acts, and
" that in order to afford adequate inducements to the Rail-
" road Companies so to do, as likewise to bring it
" practically within their power to command or obtain the
" means therefor, such payments should be received from
" them in State bonds, so as to give to them the benefit of
" the discounts at which purchases of such bonds by them
" in the market might then be practicable, and so as to per-
" mit the transfer by substitution of the statutory mortgage
" of the State for securing the company's indebtedness to
" it, to such parties as could be induced to advance the
" money wherewith to purchase the State bonds to effect
" the settlement of the company's indebtedness, and it was
" to give effect to such plan and scheme, and not for any
" purpose, fraudulent, wrongful, or in anywise inequitable,
" that the said legislation of 1869-'70 was enacted. It was
" at the time considered by all parties whose legal or equit-
" able interests were concerned in respect thereof, and as this
" defendant conceives and now insists, rightly so considered,
" that such plan and scheme and the execution thereof, in so
" far as such execution should prove practicable, would be
" *beneficial to all concerned, and unjust to no one;* that it would be
" so *as to the State*, because thereby it would secure the im-
" mediate realization and collection, *not by compromise* or un-
" der discount, *but at par, dollar for dollar of both principal*
" *and interest, of a large indebtedness* then owing to it from
" the railroad companies not yet due, except to the extent
" of the amounts in arrear of the annual payments on ac-
" count of principal due under the sinking fund provisions,

" and which indebtedness, as it then stood, was to a large
" extent then presently unavailable by way of resources to
" the State, and in respect of which indebtedness, unless
" some such plan for its settlement were adopted, there was
" danger of large eventual loss to the State in consequence
" of eventual inability of the companies to pay it in full; that
" it would be so *as to the companies*, inasmuch as, *by shifting*
" *their creditors* from the State of Tennessee to the substitu-
" tion bondholders, who would make their loans for fixed
" terms without requiring such annual payments on account
" of principal, as the State, under its laws, exacted, *the com-*
" *panies would escape the peril*, which as to nearly all of them
" was imminent, *of having their roads sold out under enforce-*
" *ment of the State's lien, by reason of their inability to meet the*
" *annual payments on account of principal of their indebted-*
" *ness* to the State, which would be required of
" them by the la , and also perhaps by *reason of the*
" *discounts of which they would gain the advantage upon the*
" *purchases in market of the State bonds*, the amount of which
" discount, if any part thereof were left after paying such
" premium or compensation as might have to be paid to the
" parties advancing the money for such purchases, upon
" the security of the new substitution bonds of the company
" authorized by the act, might go to reduce the large losses
" which the *bona fide* stockholders of the companies, whose
" money had gone into the roads, had sustained by the
" losses and depreciations consequent upon the war, in
" case anything were left for the stockholders, after pay-
" ing the company's other debts; and that it would *be so to*
" *the State bondholders in the general*, inasmuch as the natu-
" ral tendency of creating by such scheme the necessity and
" thereby the demand for the very large amount of Ten-
" nessee State bonds which the companies would have to
" purchase for such purpose, would be to *increase the value*
" *and market price of the State bonds*, as in the result proved
" to be the case very largely; and as to *such* of the State
" bondholders *as might not choose to sell* their bonds at the
" market price even as thus raised, *the intrinsic value and*
" *future price of their bonds would naturally be raised*, by
" reason of the *very large reduction of the aggregate* of the
" State's debt accomplished by the working of the scheme,

" and the increase thereby of the State's credit *and probable*
" *ability to resume payment of its current interest within a*
" *reasonable period*, and it was at that time confidently antici-
" pated that the State, after the large reduction of its aggre-
" gate indebtedness as contemplated to be accomplished by
" means of the working of the said scheme, would be enabled
" to and would resume payment of its interest, and *in real-*
" *ization of such anticipations, the State did, after its aggre-*
" *gate indebtedness had been reduced to the extent of about or*
" *nearly twenty millions by the working* of such scheme, and
" after having funded certain portions of its interest,
" *resume payment of its current interest*, and it did *for a*
" *year and a half or thereabouts pay the same*, but the
" calculations which had been made as to the extent
" of its resources and practical means in comparison
" with its indebtedness, even as thus reduced, proving to
" be over sanguine and being disappointed, the State
" again suspended payment of its interest, and still
" remains in default thereon; but this state of
" things was not anticipated when it resumed, nor when *the*
" *scheme of the Acts of* 1869 70 *was conceived and carried*
" *out as a step preparatory to such resumption ;* and it was
" further considered at the time of the said legislation of
" 1869-70, and of the settlement thereunder of the debts of
" the railroad companies to the State, and plainly so with
" truth, that while such settlements under and in pursuance
" of said acts would be beneficial alike to the State, the
" railroad companies and the State bondholders in general,
" as aforesaid, *no particular State bondholders would be in any-*
" *wise aggrieved or sustain any loss or injury thereby ;* for,
" although the company would make a profit by the dis-
" count on purchases of the bonds, *no bondholder would sell*
" *at such discount unless it were his choice and desire so to sell*,
" and he would get a better price than he would have gotten
" if the special demand and raising of the market price in
" the execution of the scheme aforesaid had not occurred.

" And this defendant saith that it was upon the views
" above set forth that the managers of this defendant's com-
" pany acted, in favoring the passage of the said Acts of
" 1869-70, and in such action as was taken by this defend-
" ant's company under and in pursuance of said acts, and

" not with any fraudulent, wrongful, improper or inequita-
" ble views or purposes, as in the bill is most untruly
" alleged.

" And this defendant further saith that the said legisla-
" tion of 1869-70 met at the time thereof the general ap-
" proval and concurrence, not only of the State authorities
" and Legislature and of the companies, but of the State
" bondholders in general, and that there was no opposition
" thereto or remonstrance against the same by or on behalf
" of any of the State bondholders, although, while the said
" bills were pending in the Legislature previous to their
" final passage, the fact of their being so pending was no-
" torious and well known to and amongst the great mass of
" the State bondholders."

* * * * * * * *

" And this defendant saith that in the settlement and dis-
" charge of the indebtedness of the respective Railroad
" Companies to the State for the bonds loaned to them
" under the Internal Improvement Act, and of the State
" statutory liens therefor, under the Acts of 1869, '70, by
" making full payment thereof in State's bonds at par, with-
" out restricting such payments by such company to the
" particular bonds which had been loaned to it, *there was no*
" *unfair or unjust advantage to the railroad companies, nor any*
" *wrong, injury or injustice, either legally or morally, to any of*
" *the State's bondholders; the value and market price of all the*
" *bonds was precisely alike, as before stated, and in so far as the*
" *bonds which had been loaned to a particular railroad company*
" *could be identified and found in the market for sale, it would*
" *have cost no more to buy them than other bonds, but there was*
" *practically no such identification or specification*, and to have
" made any such requirement would have caused almost
" endless trouble in carrying out practically the provisions
" of the act, and there was no reason whatever for making
" such requirement. No one then knowing to what par-
" ticular railroad company particular bonds had been
" issued, *it was a matter of mere accident how many of the*
" *bonds which had been issued to a particular company would*
" *be included in those purchased or acquired by it for the pur-*
" *pose of making the settlement under the act*, and so each com-
" pany paid in, naturally, some of the bonds which had

" been loaned to itself, and a much larger amount of bonds " which had been loaned to some of the large number of " other companies."

" The holder of a State bond which happened to have " been loaned to a solvent company, whose road afforded " good security to the State of Tennessee for the company's " indebtedness to it for such borrowed bond, *if he had known,* " *as he did not, to what company his bond had been loaned, would* " *have had no better pretention in equity or intrinsic justice than* " *in law, to a preference over other creditors of the State in the* " *administration of the State's assets,* whether existing in the " shape of mortgages upon its railroads or in any other " shape, inasmuch as he not only had no lien in law upon any " particular property, but he had trusted the State alone " upon its general credit, having become merely a purchaser " of a State bond, pure and simple."

For the proof of these allegations in relation to the physical condition of the East Tennessee, Virginia and Georgia Railroad and the Memphis and Charleston Railroad, the enormous losses sustained by each in consequence of the war, and the enormous expenditures required to rehabilitate them, we refer to the testimony of Sam. Tate, James B. Hoxie and R. T. Wilson, to be found on pp. 963, 975–7 of the record.

For the proof of the practical effect of these Acts of 1869–70, and the transactions under them, upon the pecuniary interest of the State bondholders, we refer to certain agreed facts which are very instructive. At the time of the passage of the Act of February 25, 1869, when all these statutory mortgage liens upon the railroads remained intact, the market price of Tennessee bonds, of course including the very bonds which these complainants now hold, was 41 per cent. The whole amount of the State debt at that time was largely over forty millions of dollars, and over twenty millions have under these Acts of 1869–'70 and '71 been surrendered and canceled. On pp. 1129 to 1133 of the record will be found an agreed statement of the current market prices of Tennessee State bonds of the various issues, old and new, and new series or fund-

ing, from April, 1870 to December, 1875, and in January, 1879, when this litigation was commenced, and for the six months next following. In this statement we find the following facts: In June, 1870, when the settlement between the East Tennessee, Virginia and Georgia Railroad Company and the State was made, the average market price of Tennessee State bonds was 61 20–100 per cent. for new bonds, and 63 04-100 per cent. for old bonds. It appears by the testimony of R. T. Wilson that the Tennessee State bonds which the East Tennessee, Virginia and Georgia Railroad Company bought for the purpose of making this settlement actually cost them in cash 55 per cent.; there was thus a rise in price, and a corresponding gain to such of the State bondholders as chose to sell, of 14 per cent. between the initiation of the scheme by the Act of February, 1869, and the time when the East Tennessee, Virginia and Georgia Railroad Company made their purchases; there was a further rise of some six or seven per cent. between the time of their purchases and the time of their settlement with the State. The price continued to rise as transactions under these Acts of 1869-70 went on, and it appears on page 1041 that the price of Tennessee State bonds in the year 1871 ranged from 63 to 75 per cent.; in 1872 the range was from 65 to 81 per cent.; in 1873, from 66 to 82 per cent.; in 1874, from 54 to 90 per cent. In January, 1879, when the first complaint of the transaction by any of the State bondholders is made, the price was 27 59-100 per cent. for new bonds, and 36 70-100 per cent. for old bonds. In March, 1874, sales were made as high as 91½ per cent. Applying these figures of price to the amount of bonds paid by the East Tennessee, Virginia and Georgia Railroad Company to the State, as the consideration for the release, which the complainants now seek to hold for naught (taking note only of the $3,835,000, the principal of the bonds, without reference to the back coupons), it appears that this amount of bonds had cost the company in cash, at the rate of 55 per cent., $2,109,250. Part of them were old bonds, or ante-war bonds, and part of them new, or post-war bonds, the value of the former being 63 per cent., and of the latter 61 per cent.; if we assume the lower of these prices for the purpose of calculation, we find the actual cash value of the bonds,

at the time when the Railroad Company paid them to the State as the consideration for this release, to be $2,339,350. At the time when this litigation was commenced the market value, which might have been realized from these bonds, supposing the Railroad Company could then get them back from the State, was about 27½ per cent. for the new bonds, and 36 70-100 per cent. for the old bonds. If we make a comparison of values upon the price of the bonds, at both periods, we should find the value of the entire lot in January, 1879, to be $1,054,620, upon which basis, if the consideration were to be returned specifically by the State to the Company, there would a loss, to some one, in the transaction of $1,284,730, consequent upon the long delay of the beneficiaries to exercise their election to disaffirm. If we make the comparison by assuming the price of old bonds at both periods, the loss would be somewhat less, but still it would be over a million dollars. *If the beneficiaries had elected to disaffirm within any reasonable period after the transaction*, and the bonds had thereupon come back to the East Tennessee, Virginia and Georgia Railroad Company, they could have realized for them not merely the amount they were worth at the time when they delivered them to the State as the consideration for the release in question; but, in the year 1871 they might have sold them for 75 per cent., realizing $2,876,250; in the year 1872 for 81 per cent., realizing $3,026,350; in 1873 for 82 per cent., realizing $3,030,191: and in 1874 at 90 per cent., realizing $3,309,500. During these years, from 1870 to 1874, inclusive, the State bondholders largely and steadily profited by this increase in the value of their bonds, consequent in large measure, if not entirely, upon these very measures upon which the complainants and their counsel now lavish unstinted abuse; and such of the State bondholders as chose to avail themselves of the opportunity sold their bonds at the advanced prices thus attainable, *and in consequence of the large reduction of the State debt which had been thus accomplished, the State was enabled to and did resume regular payment of its interest, and continue to make such payment for eighteen months.* After that time there came a series of losses and misfortunes consequent upon bad crops and low prices and numerous disasters and what are called hard

Record page 594. " 1026.

times; and unfortunately there was engendered in Tennessee by the acts of evil disposed persons the fell spirit of repudiation; and hence has come non-payment by the State of any interest whatever to any of her creditors. The bonds which these plaintiffs now hold, and upon which they found their present suits, have been all or nearly all purchased by them *long after these settlements between the State and the Railroad Companies, or most of them, embracing particularly our clients*, the East Tennessee, Virginia and Georgia Railroad Company, *had been consummated* with the *entire approval* and to the *great benefit and advantage of those who were then the State bondholders*. The parties in interest at the time of the transaction, in whom the right of disaffirmance existed, if in truth there was a mistake in law committed as to the legal powers of the State to make this settlement and give the release, are not now here to complain. These complainants, excepting Stevens, have chosen to engage in the speculation of buying Tennessee State bonds, mostly in the years 1873-4-5, while they were considerably under par, doubtless in the hope and expectation that eventually they would reach par, and be a good permanent investment, not at all as railroad mortgage bonds, but as bonds resting upon the faith and credit of the State of Tennessee, which it was supposed would finally be completely recuperated; and finding themselves disappointed in the results of their speculation by the unfortunate events of 1875 and subsequently, to which we have referred, they attempt to escape the consequence of their unfortunate speculation by going back upon a supposed technical invalidity or irregularity in the settlements between the Railroad Companies and the State, discovered, by some ingenious lawyer, and on the basis of it repudiating the transaction which their predecessors in interest fully assented to and took the advantage of. The claim of these plaintiffs doubtless is, that when they bought their bonds, as Tennessee State bonds (not only they, but their vendors supposing them to be Tennessee State bonds pure and simple, without any idea on the part of either of them that there was attached to them any lien upon a railroad), they still, upon the discovery of the legal existence of something which they had no idea of purchasing or acquiring when they

made their purchase, have a right to stand in the shoes and assert the legal rights, whatever they were, which their vendors had, though their vendors were unconscious of the existence of such rights when they made the sales to them. If this be assumed, we say it is equally true that they *succeeded to the disabilities* of their vendors, and if there had been executed a discharge upon valuable consideration of these mortgage liens (supposing them to have existed), by the act of the trustees who held the legal title to them, so transcending the legal powers of the trustee as to permit the beneficiaries to disaffirm the releases upon electing to do so with due diligence, and this right of disaffirmance had been lost by the *laches* of their vendors, they have failed to acquire this technical legal right of disaffirmance, for in the eye of the law it was extinguished before they made their purchases.

As to the case of Stevens, the position of the defendants is still stronger; his purchases were made mainly in 1878; the prices then ranged from 32 to 42 per cent., or thereabouts, including in the purchase all the back interest. As we have before stated, if it be assumed that his vendors were persons who were bondholders at the time of the settlement in June, 1870, and who, not satisfied with the rise of their bonds to 90 per cent., chose to hold on, in hopes that they might go still higher; those parties had certainly lost their right of disaffirmance by gross *laches* before the sale to Stevens. But if we assume the more probable contingency, that Stevens bought from persons who had purchased the bonds at the comparatively high prices prevailing after 1870 to which we have averted, and who, finding that they had made a bad bargain in consequence of the unfortunate events of 1874–5, concluded to submit to the loss, and sell out to Stevens at the then low market price of Tennessee State bonds, there is a failure of Stevens to acquire any right of disaffirmance in respect to the bonds purchased by him, because of the duplicated *laches* of his predecessors in title.

But we must not fail to call attention to a circumstance establishing the direct and positive concurrence of the complainants, Geddes and Terry, in the execution of the scheme of settlement with the railroad companies upon

the basis prescribed by the Acts of 1869-70. By a letter dated February 23, 1877, to his Excellency James D. Porter, the then Governor of Tennessee, written by Mr. Geddes, and signed by his firm of Geddes & Smith, and by the firm of E. D. Morgan & Co., of which Mr. Terry is a partner, and who were the then holders of the bonds upon which Terry now sues, we find those gentlemen suggesting that "*the debtors of the State* (*meaning the railroads*) *be required*, within a reasonable time, say by or before July 1, 1877, to pay off every obligation due from them to the State, as now they may do, after which time only such advances as were specifically made to each to be receivable in payment or cash; this is to apply to principal and interest." And they go on to say: "We submit to your Excellency whether there would be any hardship or injustice in requiring this, *and assure you that the creditors of the State would regard such a step as one taken in the right direction.*" This letter is to be found on the 86th and 87th pages of the volume of printed testimony. And in a letter from the complainant Geddes to the Hon. James L. Gaines, Comptroller of the State, dated August 1, 1877, on pages 88 and 80, we find Mr. Geddes saying to the Comptroller: "I think that I may now safely say to you, confidentially, that the parties in interest will be prepared to pay off the debts of the Mississippi Central to your State just as soon as it is safe for them to do so." In another letter of Mr. Geddes to the Comptroller, dated August 27, 1877, appearing on page 91 of the same volume, he says: "I have just had an interview with Mr. Osborne, who reports that in thirty days the parties in whose interest the Mississippi Central was bought in the other day will receive a confirmation of their purchase. It is quite well understood here that so soon as they can do so with safety, they will pay off the lien of Tennessee on the Mississippi Central, and that they now think they can safely pay it off sixty days hence.

There is thus little doubt that the last of Tennessee's advances to the railroads within her borders will be paid off early in the fall, thus freeing her and her creditors, too, for that matter, from a very troublesome disorder." How could we have a more complete disqualification of Messrs. Geddes and Terry to

take the position they now do in respect of disaffirmance of this release than we here find?

If, under the circumstances of general understanding and practical construction before adverted to under this and the last preceding point, there existed at the time of the transaction between the East Tennessee, Virginia and Georgia Railroad Company and the State of Tennessee, in June, 1870, a right of the holders of the State bonds originally loaned to that Company to disaffirm the transaction and annul the release, because of such release by the State as trustee being in contravention of the strict right of the State bondholders as beneficiaries of the trust, such right of the State bondholders is founded upon strict technicalities upon legal rather than moral equities. There is no possible ground for imputing fraud, bad faith, or any intentional misconduct to either the State or the company. If, in fact, the transaction was unauthorized, no worse can be said of either of the parties to it than that they were mistaken, and the case is eminently one calling for the unstinted enforcement of the well-settled rule of Equity law, which demands from a beneficiary who has a right to disaffirm the act of his trustee, that he shall do so with promptness and diligence, and before material changes in circumstances to the prejudice of the other party, or be precluded from disaffirming at all.

But it has been recently settled by the decision of this Court, that the rule requiring a party vested with a right of disaffirmance to exercise it with diligence and before material change of circumstances, is applicable even in cases of actual misconduct on the part of the parties to the transaction.

Although we have not deemed it needful to cite any authorities in support of the legal propositions asserted under this point, we will cite two cases strongly illustrative of the doctrine, and showing the extent to which it is carried, viz.: Haywood *v.* National Bank, 6 Otto R., 612, and Harwood *v.* Railroad Co., 17 Wallace, 79. In the latter case the Court say:

"If Haywood was *defrauded* of his stock, if the *title did* " *not pass* from him or the bank, because of the peculiar re-

" lations which the purchasers held to him and the proper-
" ty, if he had the right originally upon any ground to re-
" pudiate the sale and reclaim the stock, it was incumbent
" upon him by every consideration of fairness *to act with*
" *diligence* and before *any material change in the circumstances*
" *or in the value of the stock* had intervened."

Grymes v. Sanders 93 U.S. 62

THE CHAMBERLAIN CASE.

If the plaintiffs could succeed in establishing that the statutory mortgage in question is, upon its true construction, conditioned for payment of the principal and interest of the bonds by the Railroad Company to the bondholder, and if the circumstances of practical interpretation and construction, equitable estoppel, acquiescence, and laches, which we have above insisted upon were non-existent, the principle settled by the Supreme Court of the United States in the case of Chamberlain *v.* St. Paul and Sioux City R. R. Co., 2 Otto, 299, would still be fatal to the plaintiffs.

The plaintiffs would assume, apparently, that the principle decided by that case is merely that where *a mere indemnity mortgage* is given to a sovereign State for securing it for its liability upon a debt, in respect of which, although primarily bound in form and as between itself and its creditor, it is in effect as between itself and a third person, surety only, such third person being really liable as principal, a collateral security which the State, as such real security, received from the real principal, cannot be followed or laid hold of either in the hands of the State or its transferee, by the State's creditor, holding the obligation, for indemnity against which the State received the collateral security.

Upon careful examination of the facts of the case, as shown by the report in 2 Otto, and more fully on pages 2393 to 2446 of the record, in the Nashville and Northwestern case, it will be found that the mortgage given to the State, on foreclosure of which the State had bought in the lands which Chamberlain, the State bondholder, sought to follow in the hands of the State's subsequent grantee, had

such clauses and was given under such legal and constitutional requirements, as to give much stronger grounds for claiming that the mortgage was conditioned for the payment of the State bonds by the Railroad Company directly to the State bondholder, than can possibly be claimed in the case at bar.

In the Chamberlain case, the vital facts bearing upon this point were as follows:

The original Constitution of the State of Minnesota had absolutely prohibited the loan of State bonds in aid of corporations.

There was a subsequent constitutional amendment, under which the State bonds were loaned to the Railroad Company in question, being section 10 of an article of the Constitution, and which will be found on pages 2433 to 2437 of Nashville and Northwestern record, which authorized the loan of a specified amount of State bonds to certain designated railroad companies, upon certain conditions, including the following:

" Each company shall make provision for the *punctual* " *payment and redemption of all bonds issued and delivered as* " *aforesaid to said company, and for the punctual payment of* " *the interest which shall accrue thereon, in such manner as to* " *exonerate the treasury of the State from any advances of* " *money for that purpose; and as security therefor the Governor* " *shall demand and receive from each of said companies, before* " *any of said bonds are issued, an instrument pledging the net* " *profits of its road for the payment of said interest and a con-* " *veyance to said State of the first two hundred and forty sections* " *of land* free from prior incumbrances, which such com- " pany is or may be authorized to sell, *in trust for the better* " *security of the treasury of the State from loss on said bonds;*

* * * * * * * * *

" *and, as further security, an amount of first mortgage bonds on* " *the roads, lands, and franchises of the respective companies,* " *corresponding to the State bonds issued,* shall be transferred to " the treasury of the State at the time of the issue of State " bonds; *and in case either of said companies shall make de-*

" *fault in payment of either the interest or principal of the bonds* " *issued to said companies by the Governor, no more State bonds* " *shall thereafter be issued to said company, and the Governor* " *shall proceed in such manner as may be prescribed by law, to* " *sell the bonds of the defaulting company or companies, or the* " *lands held in trust as above, or may require a foreclosure of the* " *mortgage executed to secure the same.*"

The State bonds which were issued to the Southern Minnesota Railroad Company were of the form appearing on pages of the Nashville and Northwestern record. They were, by the constitutional amendment, page 472, denominated " Minnesota State Railroad Bonds," and were made payable to the Southern Minnesota R. R. Co., or order, which company, by its President, endorsed the same, payable to bearer, " waiving presentment, demand and notice."

The mortgage of the lands which were in question in the Chamberlain suit, will be found on pages 2439 to 2446 of the Nashville and North-Western record.

It conveys in mortgage the lands in question to the *State of Minnesota*, in *trust* for the uses and purposes thereinafter specified; which " thereinafter specified uses and purposes," embrace the following:

" FIRST. In case of *default in the payment of the interest* " *or the principal, when due, of the State bonds* to be issued " to the said party of the first part, in accordance with the " provisions of section 10, of Article 9, of the Constitution " of Minnesota, or (as ?) hereinbefore set forth, then and in " such case the party of the second part is hereby author- " ized and empowered to sell and convey, etc., etc., *the pro-* " *ceeds of such sale or sales, to be applied to the payment of the* " *accruing interest or principal due on the said State bonds, so to* " *be issued as aforesaid.*"

" FOURTH.—That in case of the *prompt payment by said* " *party of the first part* (the Railroad Company), *of the prin-* " *cipal and interest of the State bonds* to be issued by the said " party of the second part to said party of the first part, and ' *so soon as the same shall be fully paid and canceled*, then and

" in that case this instrument shall be and become wholly " null and void."

The Railroad Company made default in payment of the interest on the State bonds, and thereupon the State fore closed the mortgage, and bought in the lands which had thus been mortgaged to it *in trust for the uses and purposes* so provided, and subsequently conveyed away those lands to the company which was defendant in the Chamberlain suit, leaving its own State bonds, as security for the payment of which it had received the mortgage of the lands, unpaid and wholly unprovided for.

In view of the express and stringent constitutional provisions above quoted, under which the State bonds were issued, requiring that the borrowing company shall make provision for *the punctual payment and redemption* of all bonds issued and delivered to said company, and for the *punctual payment of the interest* which shall accrue thereon, *in such manner as to exonerate the Treasury of the State from any advances of money* for that purpose, and to the above quoted provisions of the mortgage deed, reciting the constitutional provision, and conveying the lands to the State "*in trust* for the uses and purposes specified," and the condition of the mortgage requiring payment of the principal and interest when due, and the further fact that the State bonds in question, instead of being issued and put in circulation as State bonds pure and simple, as these Tennessee State bonds were, were called Minnesota State railroad bonds, were made payable to the particular Railroad Company which was the mortgagor of the lands, and were endorsed by the company through its President, with a waiver of presentation, demand and notice, and delivered by the company directly to Chamberlain, we cannot fail to perceive that the Chamberlain case was infinitely stronger in Chamberlain's favor than is the case which these plaintiffs present.

The decision *cuts up, root and branch*, the whole doctrine of the right of a creditor to lay hold of collateral securities given by a principal debtor to a surety, *wherever the surety*

receiving such security is a sovereign State. It does not enter at all into any of the refined distinctions between securities, conditioned in form, for indemnification of the surety generally, and those conditioned for the payment to the creditor to the end of his indemnification (and surely there was infinitely greater ground for claim that the security in the Chamberlain case was of the latter character, than there is for so claiming in this case)—but it proceeds upon the broad ground, irrespective of that question, that wherever *security is taken in such manner as that the State practically holds it*, and while it continues to be so held, whatever rights the creditor might otherwise have in respect of its application to the purpose for which it was given, could only be made practically available by means of suit against the surety holding the collateral security, and could not be legally enforced at all, because of the non-suable character of the State, such legal rights *do not*, upon the State's transferring the property, *spring up or come into existence* but that the State's transferee takes an unincumbered title.

The Court, in that case, expressly say, that the right which a creditor in cases of this general character has—in the absence of an express contract, to such effect, between the surety holding the collateral security and himself—to have *applied to the discharge of his demand the property deposited* with the surety *for that purpose, if required by the default of the principal*, is a right arising from natural justice, and the security is *in the nature of* trust property.

And the opinion proceeds to say, that whatever right the plaintiff had to compel the application of the lands received by the State for the payment of the bonds held by him, it was one *resting in equity only. It was not a legal right arising out of any positive law or any agreement of the parties.* It did not create any lien which attached to and followed the property. *It was a right to be enforced, if at all, only by a Court of Chancery against the surety, but the State being surety here, it could not be enforced at all, and not being a specific lien upon the property*, cannot be enforced against the State's grantees.

To what kind of liens the Court referred in speaking in this opinion of "a lien which attached to and followed the prop-

erty," and in speaking of the lien of Chamberlain as "not being a specific lien upon the property of such character as could be enforced against the State's grantees," is made perfectly clear by another portion of the opinion, in which the Court say: "Where property *passes* to the State subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the Court whenever the property comes under their jurisdiction and control; thus, if property held by the Government *covered by a mortgage of an individual* owner should be transferred to an individual, the jurisdiction of the Court to enforce the mortgage would *attach as it existed previous to the acquisition* of the Government. The Syren, 7 Wal., 158–9; but where the property is not *affected by any specific lien or trust* in the hands of the State, her transfer will pass an unencumbered title." The soundness and reasonableness of the distinction here taken are quite apparent. Where a party takes or becomes entitled to a security of such character as that he has the right to look to a court of law for its enforcement, if the property upon which his lien exists subsequently passes into the hands of the government, from whose hands the courts are powerless to take it at his suit, his right nevertheless continues all the while, *his remedy being suspended*, and when *the barrier* against the exercise of his remedy by the circumstance of the Government's possession *is removed, his right, which has all along continued, again becomes enforcible by legal remedy;* but when the party chooses to make an investment or *purchase a security of such character that he has no right of looking to a court of law for its enforcement*, but relies for payment solely upon the faith and credit of the Government, which he knows to be non-suable, he voluntarily relinquishes any right or expectation of resorting to the courts for the collection of his demand, either directly against his debtor or incidentally by any *auxiliary* remedy, in respect of collateral securities or otherwise, which a court of equity is accustomed to give; having, by the terms of his bargain, wholly relinquished the principal thing, he has no title to look for the incidents; and if such is his position by his own choice of investment or security, so long as the subject-matter which he would lay hold of by way of auxiliary remedy, remains in

the hands of the sovereign power, he has no just pretension to ask that the auxiliary right, which he never bargained for or had a right to expect as an incident of his non-suable security, shall *spring into existence for the first time from the accidental circumstances* of the government choosing to transfer to a third person. In view of the principles established in the Chamberlain case, the plaintiffs could have no hope of success in their attempt to lay hold of the security here in question, unless they could establish that, in the shape in which it was originally given, it was a direct security to them, so that they could enforce it in a court of law or equity, while the State retained the position which it originally had in respect to the transaction. If they had no such legal right according to the original terms of the arrangement, but must seek redress, if any, through the State and upon the notion of an implied trusteeship of the State in their favor, they certainly could have asserted no such right while the original position of the State in the matter remained unaltered, as is certainly settled by the case of *Cunningham* vs. *Macon and Brunswick R. R. Co.*, 109 *U. S. R.*, 446, and that being so, the mere circumstance of the State's releasing or transferring the security in question *could not give them a right, then for the first time springing into existence*, to lay hold of the security in the hands of the State's releasee or transferee. Whatever may be held in respect of the true construction of the condition of the statutory mortgage now in question, this much is clear, that the *legal title to that mortgage is vested in the State as mortgagee, and is vested nowhere else*, and that if the plaintiffs have any interest in it, it is merely an equitable right as beneficiaries of a State's trust, which, while the State continued to hold the legal title to the security, could not have been enforced otherwise than by suit against the State if suable, and by reason of the non-suable character of the State could not be enforced at all ; and it is very certain that it was the State and no one else that had the right under the terms of this statutory mortgage to enter upon the mortgaged premises and take the rents and profits in case of default of the mortgagor in performing the conditions of the mortgage in respect of the payment of interest ; and it is equally clear, that in case of default on the part of

the mortgagor in the payment of such portion of the principal of the debt as at the time of the maturity of the mortgage had not been extinguished by means of the sinking fund payments, the remedy for its collection was vested in the State, and in it alone; in such case the State would have filed a bill under the sixth section, and by express provision of the fourteenth section, the Governor was authorized to depute an agent to attend the sale under the decree to be made in the suit thus instituted, and "buy in the road in the name of the State." Under the Act of 1852 the State might thus become vested with the legal title to and ownership of the railroad in virtue of thus buying it in as mortgagee, and if the State should then sell the road to some other company and put the proceeds into its treasury and leave unpaid its bonds, for the security of the payment of which (whether to itself or to the creditor) the mortgage was given, we should then have just the state of things which existed in the Minnesota case in 2d Otto, and as the Supreme Court of the United States decided in that case, with but one dissenting voice, that the State's creditor was remediless there, these plaintiffs on that authority would find themselves alike remediless.

We now proceed to answer certain propositions asserted by our learned adversaries in relation to this Chamberlain case, in the Court below, and which we suppose will be repeated here. They undertake to show:

FIRST.—That the mortgage in the Chamberlain case was, in fact, what they call a mere indemnity mortgage, and not a mortgage conditioned for direct payment by the mortgagor to the creditor.

SECOND.—That if not so in fact, the Court must have supposed or understood it to be so, and given judgment accordingly.

THIRD.—That if the mortgage would otherwise bear the construction that it was one for direct payment of the bonds, and not "for indemnity merely," as they construe that term, it would be in violation of the constitutional amend-

ment under which it was given, and that therefore it must necessarily be construed so as to conform to what they claim to be the requirement of the constitutional amendment, and so, as a mortgage for indemnity merely, and not for payment.

FOURTH.—That if, under the terms of the mortgage, Champlain had a right to sue *for the proceeds of the sale* made by the State under foreclosure of the company's mortgage, the suit was not adapted to recovery upon such a claim, being merely a suit to recover the lands.

We will consider these propositions separately.

As to the *first proposition*, what we need to say in answer to it has for the most part been said already.

As to the *fourth* proposition, it seems to us to be susceptible of such a short and conclusive answer that we give such answer first, although it is the fourth in order, so as to get it out of the way.

The State foreclosed the mortgage and *bought in* the *lands* on the foreclosure sale. Of course, *the bonds thus bought in were the proceeds* of the sale, and it was the bonds that Chamberlain sued for. How the learned counsel can say that the suit was *not* for the proceeds of the sale, passes our comprehension.

We now proceed to answer the third proposition of our learned adversaries.

The idea that there was anything in the terms or provisions of the mortgage deed, in violation of or inconsistent with the constitutional amendment, is utterly without foundation.

The *condition* of the mortgage is, " That in case of the *prompt payment* by the party of the first part of the *principal and interest of the State bonds* to be issued by the party of the second part to the party of the first part, and *so soon as*

the same shall be fully paid and canceled, then, in that case, this instrument shall be and become wholly null and void, and the same shall terminate " (*page* 2444, Record.)

And the power of sale (*page* 2442), is to the effect that " *in case of default in the payment of the interest or the principal when due of the State bonds* to be issued by the party of the first part, in accordance *with the provisions of section* 10 *of Article* 9 *of the Constitution of Minnesota*, * * * the party of the second part is hereby authorized and *empowered to sell and convey the lands*," making a specified advertisement of the sale, " the *proceeds* of such sale or sales *to be ap-* " *plied to the payment of the accruing interest or principal due* " *on the said State bonds* so to be issued as aforesaid."

The provisions (material in this respect) of the constitutional amendment (page 2435–36, Nashville and Northwestern Record), are that " each company shall *make* " *provision for the punctual payment and redemption* of all " bonds issued and delivered as aforesaid to said com- " pany, and for the *punctual payment of the interest* which " shall accrue thereon, in such manner as to exonerate the " Treasury of the State from any advances of money for " that purpose; and *as security therefor* " (*i. e.*, a *security for the company's punctual payment* and redemption of the principal, and for the punctual payment of the interest, and *not* for the interest alone, as the complainants' counsel asserts), " the Governor shall demand and receive from each of said companies, before any of said bonds are issued, an instrument pledging the net profits of its road for the payment of said interest, *and* a conveyance to the State of the first 240 sections of land * * in trust for the better security of the Treasury of the State from loss on said bonds * * but *the proceeds of all such sales shall be applied* to the *payment of interest* accruing upon the bonds in case of default of payment of the same, and as a sinking fund to meet any future default in the payment of interest, *and the principal thereof when due*."

So far from there being any inconsistency between the trust mortgage to the State and the constitutional amendment, we find in them complete accord and harmony.

The mortgage is conditioned in the most explicit terms that the company shall punctually pay the interest and principal of the bonds, and nothing could be clearer than the provision of the constitutional amendment that the company shall make provision for the punctual payment and redemption of the bonds, and for the punctual payment of the interest when it shall accrue thereon, and that as security therefor, *i. e.*, for the making of such payments, the Governor shall demand and receive a conveyance of the 240 sections of land in trust for the State's security—just such a conveyance as was in fact given by the trust mortgage in question.

So in respect of the provision for application of sales of the lands, when made, to the interest and principal of the State bonds, there is entire harmony between the trust mortgage and the constitutional amendment.

The complainants' counsel seem to treat the language of the constitutional amendment, which follows the provision requiring the company to make provision for the punctual payment of the principal and interest of the bonds, viz., that it shall be done by the company "in such manner as to exonerate the treasury of the State from any advances of money for that purpose," as in some way qualifying or affecting the provision requiring the company to make provision for the punctual payment of the principal and interest; but how, from that language, he can derive any support for his theory, that the mortgage was to be what he calls a mere "indemnity mortgage," passes our comprehension. *Under such an indemnity mortgage*, the mortgagor is not in default until after the mortgagee has been damnified by being compelled to pay the debt himself, and then, if the mortgagor refuses to reimburse or indemnify the mortgagee, he makes default in the condition of the mortgage. Nothing can be clearer than the proposition that, by the terms of the constitutional amendment, such was *not* to be the character of the obligation of the railroad company borrowing the State bonds, nor such the condtiion of the mortgage security to be given by it to the State. It would have been impossible to express more clearly than is done by the constitutional amendment, that the obligation of the company, and the security to be given for it, were to be *for payment by it of*

the principal and interest of the bonds, so that the State might *never have to advance* or pay, and not merely for reimbursement or indemnity in case of the State's having to pay.

Equally without foundation is the proposition of the complainants' counsel, that the giving of the trust mortgage or conveyance of the lands by the company, conditioned for the direct payment by it of the principal and interest of the bonds, was forbidden by the provision of the constitutional amendment requiring that it should be a conveyance in trust "for the better security of the treasury of the State from loss on said bonds."

There are two obvious answers to this proposition of my learned adversary, *either* of which alone is complete and all-sufficient:

1. It having been before provided in this article of the constitutional amendment, a few lines before the occurrence of these words, that the company's obligation shall be to pay the principal and interest of the bonds, and that *as security therefor* the Governor shall demand and receive this trust conveyance or mortgage of the lands, the words in question must necessarily be taken in connection with those previous provisions, which show in what manner the treasury of the State was to be secured from loss on the bonds.

2. Had there been no such previous explicit provision as to the method by which the State should be secured from loss upon the loan of the bonds, but there had been merely a general provision that there should be a mortgage or trust conveyance to the State, to secure it against loss, or even, to use the favorite language of my learned adversary, "for the indemnification of the State," a mortgage or trust conveyance in the particular form here used, viz.: one conditioned directly for the payment of the debt (the doing of which would necessarily secure and indemnify the State in the fullest and completest manner), would have been in no wise inconsistent with the requirement. There would have been merely a specification of the method, and that a complete one, instead of leaving the method open, and the change would have been *in favor of*, and not *against* the interest of

the party receiving the security; because the rule of law is well settled that, on an agreement of indemnity generally, the indemnitee cannot sue, or at all events cannot recover more than nominal damages, until he has paid, whereas, upon an agreement specifying the method of indemnity, by direct payment to the creditor, the indemnitee may sue and recover the full amount of the debt, treating the existence of the outstanding obligation against him as legal damage to that amount.

But we submit with entire confidence that, under the peculiar requirement of this constitutional amendment, for such an indemnity as to exonerate the State from any advances of money, no obligation of indemnity which fell short of providing for the payment of the debt would answer the requirement.

The State was bound upon its bonds to pay the money to the holder. It was to be indemnified against this by the Railroad Company for whose benefit the bonds were issued, and the indemnity was to be in such shape as that the State should not be obliged to advance any money.

The bonds had to be paid by some one. They certainly would not pay themselves. How was the State to be saved from advancing, short of payment of the bonds by the indemnitor?

A mere general agreement of indemnity would have entitled the State to reimbursement after the State had advanced the money. But that was not the thing called for. It was to be saved from making the advance.

In reference to the second proposition of our learned adversaries on this head, we must join issue with them directly

They assume that we are endeavoring to show that the Court, in rendering the Chamberlain decision, misunderstood the facts of the case. That is not so at all, but the direct contrary. We show by the record what the precise facts in the Chamberlain case were, the evidence being all documentary, and by that means show that there is no ground for assuming, as the complainants' counsel do, that

the decision of the Chamberlain case was based upon the supposed nice distinction in relation to what they call indemnity mortgages.

And it is the complainants' counsel, not ourselves, who are in the position of claiming that the court in rendering the Chamberlain decision mistook the facts.

My learned adversary undertakes to represent me as claiming to have "discovered" something in relation to the condition and effect of the mortgage in the Chamberlain case which was not known to, or understood by, the court who decided that case, or the counsel who argued it.

What could be more preposterous?

The Chamberlain case presented the single question whether the creditor holding the State bonds, could by proceedings in equity lay hold of the property mortgaged to the State by the Railroad Company, to whom the bonds had been loaned, the State having, upon the company's default, foreclosed the mortgage and bid in the lands, and then, after repudiating its own bonds, conveyed away the property in utter disregard of the purposes for which it had been received; and the court held that the creditor had no such right against the State's grantee, because of the nonsuable character of the State to whom the mortgage had been originally given.

What the learned counsel terms my "discovery," and attributes to "industry and ingenuity," consists simply in my reading to this court *from the record in the Chamberlain case*, not some isolated or buried clause or article, but *the express condition and main substantive provisions of the mortgage deed, upon which the complainants' claim was founded*, and the provision of the constitutional amendment of Minnesota, under which the bonds were issued and the mortgage security given.

It seems to me entirely plain that the attempt of Judge Hoadly to show that the court and counsel in the Chamberlain case were wholly mistaken in relation to the nature and effect of the mortgage, and proceeded upon the false assumption that it was what he calls a mere indemnity mortgage (*i. e.*, a mortgage conditioned in general terms for indemnifying the surety without any direct provision for payment of the debt), is utterly without foundation.

Upon referring to the language of the mortgage in this respect, we find no uncertainty and no room for doubt or misconstruction. We *do not find* the word "*indemnify*," or *any such like word, used at all.*

The condition of the mortgage, in words as plain as the English language could furnish for the purpose, is for *payment* by the mortgagor *of the principal and interest of the bonds.* It is just that and nothing else.

The supposition of my learned adversary is extravagant beyond measure, and involves a "*stultification*" of the Court which is unparalleled.

No one, upon examination, can fail to see that the proposition of the learned counsel substantially is, that the Court blundered in its understanding of the plainly apparent and indisputable facts of the case, to a surprising degree.

It is apparent beyond possibility of doubt that Mr. Justice Field, while preparing the statement of facts which precedes the opinion, must have *had before him the precise words* of the trust mortgage and the constitutional amendment, *from each of which he so largely quotes*, and to suppose that he fell into the mistake supposed, is incredible. But irrespective of this circumstance, how can any one really imagine that the counsel who argued this case and the other eight judges who heard the argument and took part in the decision, failed carefully to read and consider these vitally important portions of the record, the provisions upon which the whole controversy arose. Moreover, it appears that Mr. Justice Strong *dissented* from the decision. In all the other members of the Court had fallen into *the extraordinary mistake* which the supposition of the learned counsel imputes to them, *can it be supposed* that the dissenting judge would have *failed to point it out to them?*

Now, what are the bases upon which the learned counsel undertakes to impute to the Court this extraordinary blundering?

1. He refers to the *reporters'* "*syllabus*" mentioning the trust conveyance or mortgage as being made to the State "as indemnity against losses on her bonds loaned."

I have always hitherto understood, and shall continue to understand, that if a reporter's "*syllabus*" be found to vary

from the actual points of the decision, as apparent from the opinion of the court, and the record, the only thing needing correction is the *syllabus*.

But beyond this obvious and complete answer, it is to be observed that it is *perfectly true* that the lands in question *were* conveyed in mortgage to the State "as indemnity against losses on her bonds loaned to the company."

The mortgage, instead of merely providing *in general terms* that the State should be indemnified by the company without stating how, *specified how that indemnity should be accomplished*, viz., by direct payment of the principal and interest of the bonds, for which payment the mortgagor was expressly bound by the conditions of the mortgage, and *in case of breach by the mortgagor of such conditions*, then by *sale* of the lands under the power of sale contained in the mortgage, and *application of the proceeds* of such sale *to the payment of the principal and interest of the bonds*. Unquestionably this specification of the particular methods by which the indemnification of the State should be accomplished (and which would accomplish a complete and perfect indemnity), did not make this any the less a trust mortgage or conveyance "for indemnifying or securing the State."

And this one consideration at once blows away the whole cloud of dust in which my learned adversary undertakes to envelope and obscure the particular branch of our case which he there discusses. He proceeds upon the obvious and utter fallacy that a mortgage or trust conveyance providing for accomplishing the indemnification of the surety by the particular method of an obligation for direct payment to the creditor by the mortgagor, and application of the mortgaged property or its proceeds to such payment in case of the mortgagor's default, is not a mortgage or conveyance for the indemnity or security of the surety.

We are not, however, obliged to rely merely upon the natural assumption that the Court read and understood the mortgage upon which the complainant in the case before them based his claim. The opinion of Mr. Justice Field shows affirmatively and clearly that he *did not imagine* the mortgage in question to be what my learned friend calls a

mere indemnity mortgage, but perfectly understood, and had in mind that it was a mortgage conditioned for direct payment.

In the commencement of the opinion he states the complainant's position to be, that "*as the creditor to be paid*, he is entitled to *have the securities* taken by the State *applied to the payment of the bonds* held by him."

And subsequently he says: "The general doctrine that a creditor has a right to claim the benefit of a security given by his debtor to a surety for the latter's indemnity, and *which may be used if necessary for the payment of the debt*, is not questioned."

I trust I have now succeeded in showing beyond the possibility of further contradiction that the mortgage in the Chamberlain case was not at all of the character of what my learned adversary calls mere indemnity mortgages, but was a mortgage conditioned for direct payment, and that there is no warrant whatever for saying, or even imagining or suspecting, that the Court, in giving its decision upon the rights claimed under it, understood or supposed it to be other than it really was.

I will now notice the rather extraordinary proposition stated by Judge Hoadly, viz., that Chamberlain's suit was not brought to recover the proceeds of the trust mortgage; and the various positions which, of his own head merely, and without any warrant from either the record or the report of the case, he assumes were taken or claimed by Chamberlain's counsel in that regard.

It appears, beyond contradiction, from the report of the case, that Chamberlain's claim was, that upon the facts of the case, as shown by the record, he was entitled to have the lands then in the hands of the State's grantee applied to the payment of his bonds; and that those facts were, that the company had given to the State the mortgage in question, conditioned for direct payment of the principal and interest of the bonds, and providing, in case of default in such condition, for sale of the lands and application of the

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proceeds to the payment of such principal and interest; that such default occurred, and the State thereupon foreclosed the mortgage, and bought in the lands on the foreclosure sale; and that then the State, having repudiated its own bonds in 1860, granted away the lands in 1864 to another Railroad Company (the defendant in the suit) to aid in the construction of its road.

Upon this state of facts, nothing can be clearer than that *the lands themselves*, when brought in upon the foreclosure, *became and were the proceeds of the sale*, and remained, as such specific proceeds, in the State's hands when she gave them away to the other Railroad Company; and that if, under the provisions of this mortgage (by which it was agreed, *between the Company and the State*, that the proceeds of the lands when sold under foreclosure of the mortgage should be applied to the payment of the bonds), the holder of the bonds had any *right*, in the nature of a trust interest or otherwise, *which was enforcible in law or equity*, to compel the application of such proceeds to the payment of the bonds, such right attached to the lands remaining in the State's hands as the proceeds of the sale, at the time when it granted them away.

If this were to be treated as a transaction between individuals, and if the bondholder were to be regarded as *in legal effect a party to the agreement made between the railroad company and the State* as to the application of the proceeds of the sale, so as to *give him a contract right* to have that agreement carried out for his benefit, no lawyer could doubt that such right was attached to the lands when the State gave them away.

As I have said, the assumptions of Judge Hoadly as to the line of argument upon which Chamberlain claimed to subject the lands to the payment of his bonds, are the creations of his imagination. There is no warrant for asserting and no ground for supposing that Chamberlain omitted to claim the lands upon the true grounds of claim existing under the facts, if there were any such grounds.

Now, it is indisputable that what the Court did decide was precisely this, viz.: that upon the facts of that case as appearing to them upon that record, Chamberlain had no

claim enforcible against those lands. We find *no allusion* in the report of the case, or in the record or anywhere else, *to any such points as are now suggested* by the lively imagination of my learned friend—as to this being *supposed to be* what he calls a mere indemnity mortgage, instead of what it really was, or as to the provision of the mortgage being inconsistent with or in violation of the constitutional amendment, or as to the claim of Chamberlain to follow the lands being mistakenly asserted upon such grounds as are assumed by Judge Hoadly—but the decision proceeds upon the plain and distinct ground, which the persistency and ingenuity of my learned friend cannot obscure, that whatever right Chamberlain had to compel the application of the lands to the payment of his bonds (*in accordance with the agreement made between the State and the company*, as expressed in the mortgage), was *not a contract right*, but one *resting in equity only*; that it was merely an equitable right to lay hold for his own benefit of a security, or the proceeds of a security, taken by another party, *under an agreement to which he was not a party*, which right could not be enforced except by suit against the party receiving the security, and that inasmuch as the party receiving the particular security in question was a sovereign State, against whom no suit could have been brought while it held the security, no such suit could be brought against its transferee.

We find it enunciated in the most direct and positive terms in Mr. Justice Field's opinion, *that rights of this character, including the particular rights of Chamberlain* under the mortgage security which was before the Court, are *not contract rights, but rights resting in equity only.*

In speaking of a security given by a debtor to a surety for the latter's indemnity, "and which may be used if necessary for the payment of the debt," he says: "The security in such case is *in the nature of trust* property, and the *right* of the creditor *arises from the natural justice* of allowing him to *have applied to the discharge of his demand* the property deposited with the surety *for that purpose*, if required by the default of the principal."

And then, in speaking of the right of Chamberlain, *under the particular security then before the Court* (the nature and effect of which, as conditioned for direct payment and not

merely for indemnity, and as containing a distinct agreement between the State and the company for the application of the proceeds of the security to the payment of the debt, I have shown to be indisputable and too plain for mistake), the Court say: "Whatever right the plaintiff had to compel the application of the lands received by the State to the payment of the bonds held by him, it was one *resting in equity only*. It was *not* a legal right *arising out* of any positive law or *any agreement of the parties*. It *did not create any lien* which attached to and followed the property. It was a right *to be enforced*, if at all, *only by a Court of Chancery against the surety*, but *the State being the surety here, it could not be enforced at all*, and *not being a specific lien upon the property* cannot be enforced against the State's grantees."

There is here no room for doubt as to the principle enunciated, nor upon the point of its being practically applied by the Court in the case of a security taken by a State, in which there was far greater ground for the creditor's claiming that he had an independent right under the security, as beneficiary of a trust created by it, than can possibly be claimed by these plaintiffs under or in virtue of the statutory mortgage which the State of Tennessee here took to itself; because what is *here* claimed merely as *an implied trust* in favor of the Tennessee State bondholder, was in the Chamberlain mortgage *expressed* in the plainest manner.

If the Court had considered that the *agreement between the Minnesota Railroad Company and the State of Minnesota*, contained in the provision of the mortgage relating to the application of the proceeds of the sale of the lands, was *equivalent to an agreement to that effect made with the State bondholders*, they never could have said, as they did in the opinion, that the plaintiff's right to compel the application of the lands to the payment of the bonds was *not a right arising out of any agreement of the parties*, but was one resting in equity only.

The Court proceed upon the very manifest distinction between the legal right of a party *to enforce a contract made with himself* and a mere *equitable right to lay hold of and get*

the benefit of a contract made with another, and to which he was not a party, upon the ground that "natural justice" or equity requires that he should be allowed to obtain such benefit.

The assertion in the argument of Judge Hoadly, that in what I claim as the necessary result of the Chamberlain decision, I must claim that *a direct contract, made by the State itself, with the party who* subsequently *sets it up* against the State's grantee of the subject matter thereby affected, is of no legal efficacy, entirely overlooks the manifest distinction above presented, upon which the Court proceeded in the Chamberlain case, and is an obvious fallacy.

And so, the case decided by Chief Justice Waite, in the North Carolina Circuit, of *Swasey* vs. *North Carolina R. R. Co.*, 1 *Hughes*, 17, cited by Judge Hoadley, is wholly inapplicable here; as that was the case of railroad stock *owned by the State*, which, by a statute passed by it, was *directly pledged by it to its own bondholders* as security for its bonds, upon the faith of which pledge the bonds were purchased.

I cannot imagine that the appellants' counsel can succeed in confusing or obscuring the real point of the decision in the Chamberlain case, which, upon comparison of that case with this, is plainly decisive of this case against the plaintiffs; because no one can deny, upon intelligent and fair examination and comparison, that the circumstances of that case were *infinitely stronger in many respects, and not weaker in any one point* in favor of Chamberlain, than the circumstances of this case are in favor of the Tennessee State bondholders.

It may not be amiss to call attention to the fact that the decision in the Chamberlain case was some two years prior to the transaction here in question of *one* of my clients (in the case of the Memphis and Charleston Railroad Company), involving some $1,800,000, which was entered into under my advice, after the doctrine of the Chamberlain case had been established by the Supreme Court, against the fruitless contention to the contrary of my partner, Mr. Evarts.

STATE OF TENNESSEE AN INDISPENSABLE PARTY.

Assuming for the purposes of argument that the complainants are right in their position—that the State of Tennessee held the statutory mortgage in question, not simply in its own right, but as a trustee of a trust whereof the complainants and others were beneficiaries in interest, and that the act whereby the State undertook to receive from the mortgagor payment of the mortgage debt in its own obligations and thereupon to release and discharge the mortgage, was a breach of trust by the State, in fraud of their rights, of such character as to entitle them as beneficiaries, upon their election so to do, to impeach and annul the release and compel the execution of the trust for their benefit, as if such ineffectual release had not been given or attempted, and that no adequate defense upon the ground of equitable estoppel or acquiescence or laches is established—this suit is subject to the fatal objection, (distinctly taken in the answers), that the State of Tennessee is not merely a *proper* party but an *indispensable* party, without whose presence before the court in the suit, no decree in favor of the complainants can be made without the violation of well-settled and inflexible principles of equity law.

And it is established beyond dispute as a rule of procedure in equity, that where an *indispensable* party is not before the court, and it appears impossible to bring in such party, whether because of his not being amenable to the process of the Court, or because bringing him in would oust the jurisdiction (as in case of co-citizenship with the parties on one side of the controversy in the Federal Courts), the necessary consequence is, *not* that the suit shall proceed to decree without the presence of the indispensable party, but that it shall be dismissed, because of the inability to carry it on in any way in which a Court of Equity could properly permit.

Shields *v.* Barron, 17 How., 130.
Barney *v.* Baltimore, 6 Wall., 280.
Kendig *v.* Dean, 97 U. S. R., 425.

It is quite clear, upon principle, that the rule above referred to applies as well where the indispensable party is a

sovereign State, over whom the Court is, by an express constitutional provision, prohibited from assuming jurisdiction, as in any other case of failure or inability to bring in an indispensable party, and so it has been expressly decided.

Branch *v.* Macon and Brunswick Railroad Company, 2 Woods, C. C. R., 388.

Cunningham *v.* Macon and Brunswick R. R. Co., 109 U. S. R., 446.

To defeat the suit upon this ground alone we have, therefore, only to show that the State of Tennessee is an indispensable party within the well established principle above referred to, and we submit that it is too clear for dispute that she is such indispensable party, for two reasons:

FIRST.—These releases, which the complainants allege were given by their trustee in fraud of their rights as beneficiaries, were founded upon considerations of very large pecuniary value, cotemporaneously delivered by the releasee to the releasor.

In the East Tennessee, Virginia and Georgia Railroad case, the value of the Tennessee State bonds which constituted this consideration was, at the time of the transaction, over $2,300,000.

At the time when the first attempt at disaffirmance and annulment was made, nearly nine years afterwards, these had fallen in value, to the extent of say fifty per cent.

In all the other cases there exist circumstances of like general character, with variations as to amounts and details.

If, upon the demand of the complainants as objecting beneficiaries of the trust upon which the State held the mortgage, the release is to be held for naught, and set aside, and the property of the releasee subjected to the enforcement of the lien as if there had been no release, the releasee is, of course, equitably entitled to receive fram the releasor restoration in some form, or compensation after some measure, for the consideration paid for the attempted but ineffectual release.

What, precisely, shall be the method or measure of such restoration or compensation, may involve questions of a very complicated and perplexing character, and may in-

volve an examination of resulting rights and interests of other and independent parties; but that in some method, and after some measure, the Railroad Company is entitled to have such restoration or compensation, is undeniable.

Therefore, the State of Tennessee is an indispensable party to a suit, the decree in which must, if made in the plaintiffs' favor, have, as to the State, such serious consequences, for two reasons:

1st. The releasee is entitled, before being compelled to submit to reinstatement and enforcement of the lien which *the plaintiffs' trustee holding the legal title* released to it upon full and valuable consideration, to have the trustee brought before the Court so that the rights and equities in respect of restoration of or compensation for the consideration of the avoided release may be *at the least* properly adjudicated before the releasee is subjected to the active operation of the lien.

2d. The effect of a decree setting aside these releases, given by the State, and leaving the State, at least, *under obligation* to make to the releases present return of or compensation for the consideration received for the annulled releases, whether the methods and measure of such restoration or compensation be adjudged by the Court, or be left unsettled, to be adjudicated upon or adjusted at some future time and in some other way, *would be a matter of very serious importance to the State, and might prejudice her interests to a very great extent.* Decrees thus annulling the State's releases, and obligating her for the return or compensation for the considerations received, would *undo* the measures by which, under the Acts of 1869 and '70, she undertook and accomplished the reduction of her State debt to the extent of some twenty millions, and would involve the reinstatement of her relations with and responsibilities for the railroads, which in 1869–70 she deemed it so important to her interests to escape from. The State of Tennessee claims to have accomplished for herself such escape by the transactions with the companies had in pursuance of the Acts of 1869-70, and she claims that what she thus did was fully

justified by her rights and powers under the Act of 1851–2, *including the reserved powers of the twelfth section.*

These questions cannot be adjudicated against her in a suit in which she is not a party, and if the complainants could persuade this court to make such an adjudication in her absence, if the defendants should afterwards, in any form, either before her own courts, if she permitted herself to be sued, or before her Legislature, or in any way, make any affirmative claim against the State of Tennessee, either for restoration or compensation in respect of the considerations received by her for the releases, the State of Tennessee would be well entitled to respond, that the adjudication of the invalidity of the release, as a consequence of which the restoration or compensation was claimed, was *in no way binding upon her*, but was *utterly void*, so *far as she* was concerned, and that considering it to be wholly wrongful, she would pay no respect or attention to it.

But there is another independent and still stronger reason which makes the State of Tennessee an indispensable party, without whose presence the complainants cannot possibly have any relief or decree as they seek.

Supposing the plaintiffs to have succeeded in convincing the Court of the soundness of the position they assume—that the State held this mortgage as trustee, and that they and their associates under it, as beneficiaries of the trust, had such a vested interest as prevented the trustee from giving to the Railroad Company, upon such consideration as was here received, a valid and effectual release of the mortgage, and that such attempted release is properly to be annulled and set aside upon complaint of the beneficiaries --granting all this, the result thus produced is, that the attempted transaction is *undone*, the release must be set aside, and it becomes the duty and clear obligation of the State to restore to the company the consideration received for it, *and then all parties resume the status quo*, as if the transaction, found to be wholly ineffectual, had never been attempted.

What then is the situation?

The State now holds this statutory mortgage, just as she originally held it. She holds, as she always did, *the legal title to the mortgage security*. (Of course this is to be distinguished from the legal title to the mortgaged premises.)

But, while she is thus the mortgagee, she holds the mortgage upon the identical trust upon which she originally held it. The complainants and the other bondholders are beneficiaries of that trust, but the *State herself is also a beneficiary*, and her beneficial interest is, *in point of amount*, coextensive with the whole amount of the mortgage debt, because of the State's primary and absolute liability upon the bonds, which the mortgage was given to her to secure, however inadequate in result the mortgaged premises might ultimately prove to be, either because of unwise or improper management of it, or from intrinsic feebleness of security, or otherwise, to afford that complete indemnity to the State which was designed to be accomplished by taking it.

The trust upon which the State thus holds the mortgage in question is to continue for a *long term of years* yet to come, and is *an active trust*.

By the express terms of the mortgage, the right, power and duty of taking possession of the mortgaged premises in case of default of the mortgagor, and running and operating the railroad, paying its expenses and receiving its net income, is *vested exclusively in the State*, and by express provision of the law, whatever *net income* is gotten from the property, after the entry of the mortgagee upon the mortgaged premises, after the mortgagor's default, is to be *paid into the State Treasury*.

The power of control and *management* of the property after default made by the mortgagor, is vested exclusively in the State, through the Governor, who is to appoint a Receiver, and the Receiver, as the State's bailiff, and under the management and control of the State authorities, is to conduct the highly important operation of running and practically managing the road. The extent to which the amount of net income practically obtainable from a railroad is dependent upon the course of management adopted, and

the *personnel* of the manager, is too well known to require comment.

It many times happens that the actual net income obtainable from the same road, under the same external circumstances, may be varied to the extent of one-half or more, as the practical power of management and control may be vested in one man or another.

Besides these rights and powers of great practical importance and value in respect of control and management, which by the express terms of the statutory mortgage in question are vested in the State, and in the State exclusively, and besides the general interest which the State has in virtue of its absolute liability upon the bonds, to have the road so managed as to obtain the interest in arrear and accruing, *the legal rights and interests of the State in respect of collecting from time to time the sinking fund installments, and enforcing the remedies provided by the mortgage for that purpose*, whether by sequestration of the revenues, or sale of the road itself, or both, *remain intact and in force.*

Such being the situation—*the State of Tennessee holding exclusively and in its name, and not by or in the name of any of its officers*, the mortgage and mortgage title, and being vested with this active trust, with its large and long-enduring powers and duties, and these large and beneficial powers of management and control, as well for its own great interest as the larger beneficiary, though with certain interests existing in others, as being *also* beneficiaries of the trust, what do these other beneficiaries now ask this Court to do?

Their idea, as nearly as I can understand it, appears to be, that the Trustee has been guilty of such misconduct, in derogation of their rights, as to forfeit the right to continue as Trustee, and therefore has become subject to removal from the trusteeship, or perhaps they go so far as to assert either that the Trustee is *ipso facto* removed, by the misconduct, or must be deemed to have renounced.

To us it appears to be entirely clear that neither of these propositions can possibly be maintained without utter defiance of the best settled and most ordinary and familiar legal and equitable principles, and that in truth no idea so

extravagant as each and all of them, would ever have occurred to any of our learned adversaries, had they not been made necessary by the intrinsic and insurmountable difficulties of their case, when tested upon any sound principles.

In truth, the plaintiffs' proposition is that the Trustee is justly subject to removal from the trust because of having been guilty of conduct in derogation of the rights of the beneficiaries, and because, under the prohibition of the Federal Constitution, it is impossible for the Court to gain jurisdiction over the Trustee for the purpose of pronouncing a decree for removal, it shall proceed upon the basis of regarding the removal as accomplished *ipso facto* by the misconduct. As the Court is *powerless to pronounce the judgment* against the Trustee, it shall *commence* the proceedings *by issuing the execution.*

As it cannot render any decree divesting the Trustee of the trust or trust property, or interfering with the exclusive powers of possession, control and management which, under and in virtue of the original mortgage, now supposed to be pronounced to be valid and in full force, the Trustee holds and is indisputably entitled to, it is proposed that the Court, through its own marshal or other officer, *without any such decree and without affording to the Trustee who is thus to be ousted any opportunity to be heard in defense of its rights,* shall take the trust property and its control and management out of the hands and control of the Trustee in whom, by the express terms of the mortgage, it is exclusively vested.

This appears to be an attempt to put practically in force the old idea of "outlawry," or something very like it.

It would be preposterous if the Trustee thus attempted to be dealt with were a private person: When it is considered that such Trustee is a sovereign State, and that the Court which was applied to to take such action holds its sessions within the sovereignty, and derives its powers over the subject matter by reason of the citizenship of the parties, and not the nature of the subject matter, and in respect of *this* point it can at least not go beyond such powers as could be exercised by a court constituted by the sovereign thus pro-

posed to be dealt with, the proposition seems to be too preposterous for discussion.

The idea of renunciation of the trust by the trustee is equally preposterous. No decree declaring such legal result in respect of the legal ownership of this great subject with the exclusive, urgent and valuable powers of management and control vested in the trustee, as the implied consequence of an act *in pais*, can possibly be pronounced without utter contempt for established legal principles, without first bringing in before the Court the trustee thus proposed to be ousted, and giving such trustee the opportunity to be heard before pronouncing the decree.

And, if the trustee were thus brought in, it would be clearly perceived that there is no pretense for an idea of such renunciation, or even of any intention to renounce. The act of the trustee from which this result is claimed must be taken as a whole. In it we find an indication of an idea (supposed for the purpose of this discussion to be *mistaken*, but certainly nothing worse) entertained by the trustee, that the trust was terminated, but nothing in the least tending to show any intention of resigning or renouncing the trust, in case of its continued existence. And in view of the trustee's interests, rights and duties in respect of the trust and trust estate, in case of the idea of the trust being terminated proving to be a mistake, and the valuable powers, as well beneficial as interest, necessarily vested in the trustee, if the trust is to be deemed still in force, to construe this mistaken action of the trustee, upon the supposition of the trust being terminated, into a renunciation of the trusteeship, in case of the trust being found to be still in force, is mere *perversion*.

We have now to present a further proposition, which appears to us to require no argument for its support and to be unanswerable.

We need only quote it as follows from the answer of the East Tennessee, Virginia and Georgia Railroad Company :

" And this defendant denies the allegations of the bill, to " the effect that the complainant, by virtue of his alleged

" rights as a bondholder and the terms of the statutory " mortgage above described, is entitled to have the posses- " sion of the East Tennessee and Georgia Railroad, in the " State of Tennessee, secured by a Receivership for the " benefit of the holders of the Internal Improvement Bonds " loaned to the East Tennessee and Georgia Railroad Com- " pany, and for the payment of the interest thereon, for " which it is alleged the said company became bound, and " each and every of such allegations, and every part there- " of, and in respect to the allegation of the complaint, that " the Receiver or Receivers so to be appointed should ap- " ply the revenues of the property to the payment of the " overdue interest on said bonds, this defendant, while utter- " ly denying the right to any such Receivership, saith that *this* " *demand of the complainant for the payment over and applica-* " *cation by the Receiver or Receivers, in case of his or their* " *appointment, of the net revenues of the property, in the manner* " *sought by the bill, would be in direct and clear violation of* " *what the complainant claims to have been an unalterable con-* " *tract*, it being clearly and positively provided by the " original act that the Receiver or Receivers appointed " thereunder *shall pay the net revenues of the road realized by* " *means of the Receivership into the Treasury of the State of* " *Tennessee.*"

CHS. F. SOUTHMAYD,
Of Counsel for Appellees.

STATEMENT

SHOWING IN WHAT PERIOD A DEBT OF $100,000 WILL BE EXTINGUISHED BY MEANS OF ANNUAL PAYMENTS OF $1,000 (ONE PER CENT.) KEPT INVESTED IN A SINKING FUND, DRAWING SIX PER CENT. PER ANNUM INTEREST, PAYABLE SEMI-ANNUALLY.

First yearly payment	$1,000 00
Six months' interest	30 00
	1,030 00
Six months' interest	30 90
	1,060 90
Second payment	1,000 00
Amount at commencement of 2d year	2,060 90
Six months' interest	61 82
	2,122 72
Six months' interest	63 16
	2,185 88
Third payment	1,000 00
Amount at commencement of 3d year	3,185 88
Six months' interest	95 57
	3,281 45
Six months' interest	98 44
	3,379 99
Fourth payment	1,000 00
Amount at commencement of 4th year	4,379 99

Brought over	4,379 99
Six months' interest	131 39
	4,511 38
Six months' interest	135 34
	4,646 72
Fifth payment	1,000 00
Amount at commencement of 5th year	5,646 72
Six months' interest	169 40
	5,816 12
Six months' interest	174 48
	5,990 60
Sixth payment	1,000 00
Amount at commencement of 6th year	6,990 60
Six months' interest	209 71
	7,200 31
Six months' interest	216 00
	7,416 31
Seventh payment	1,000 00
Amount at commencement of 7th year	8,416 31
Six months' interest	252 48
	8,668 79
Six months' interest	260 06
	8,928 85
Eighth payment	1,000 00
Amount at commencement of 8th year	9,928 85
Six months' interest	297 86
Carried over	10,226 71

Brought over	10,226 71
Six months' interest	306 80
	10,533 51
Ninth payment	1,000 00
Amount at commencement of 9th year	11,533 51
Six months' interest	346 00
	11,879 51
Six months' interest	356 38
	12,235 89
Tenth payment	1,000 00
Amount at commencement of 10th year	13,235 89
Sixth months' interest	397 07
	13,632 96
Six months' interest	408 98
	14,041 94
Eleventh payment	1,000 00
Amount at commencement of 11th year	13,041 94
Six months' interest	451 25
	15,393 19
Twelfth payment	1,000 00
Amount at commencement of 12th year	16,957 98
Six months' interest	508 73
	17,466 71
Six months' interest	524 00
Carried over	17,990 71

Brought over	17,990 71
Thirteenth payment	1,000 00
Amount at commencement of 13th year	18,990 71
Six months' interest	569 72
	19,560 43
Six months' interest	586 81
	20,147 24
Fourteenth payment	1,000 00
Amount at commencement of 14th year	21,147 24
Six months' interest	634 41
	21,781 65
Six months' interest	653 44
	22,435 09
Fifteenth payment	1,000 00
Amount at commencement of 15th year	23,435 09
Six months' interest	703 05
	24,138 14
Six months' interest	724 14
	24,862 28
Sixteenth payment	1,000 00
Amount at commencement of 16th year	25,862 28
Six months' interest	775 86
	26,638 14
Six months' interest	799 42
	27,437 56
Seventeenth payment	1,000 00
Amount at the commencement of 17th year	28,437 56

Brought over	28,437 56
Six months' interest	853 12
	29,290 68
Six months' interest	878 72
	30,169 40
Eighteenth payment	1,000 00
Amount at commencement of 18th year	31,169 40
Six months' interest	935 08
	32,104 48
Six months' interest	963 13
	33,067 61
Nineteenth payment	1,000 00
Amount at commencement of 19th year	34,067 61
Six months' interest	1,020 02
	35,087 63
Six months' interest	1,951 11
	36,138 75
Twentieth payment	1,000 00
Amount at commencement of 20th year	37,138 75
Six months' interest	1,114 16
	38,252 91
Six months' interest	1,147 58
	39,400 49
Twenty-first payment	1,000 00
Amount at commencement of 21st year	40,900 49
Six months' interest	1,212 01
Carried over	41,612 50

Brought over	41,612 50
Six months' interest	1,248 37
	42,860 87
Twenty-second payment	1,000 00
Amount at commencement of 22d year	43,860 87
Six months' interest	1,315 82
	43,176 69
Six months' interest	1,355 20
	46,531 89
Twenty-third payment	1,000 00
Amount at commencement of 23d year	47,531 89
Six months' interest	1,425 95
	48,957 84
Six months' interest	1,468 73
	50,426 57
Twenty-fourth payment	1,000 00
Amount at commencement of 24th year	51,426 57
Six months' interest	1,542 79
	52,969 36
Six months' interest	1,589 08
	54,588 44
Twenty-fifth payment	1,000 00
Amount at commencement of 25th year	55,558 44
Six months' interest	1,666 75
	57,225 19
Six months' interest	1,716 75
Carried forward	58,941 94

Brought forward	58,941 94
Twenty-sixth payment	1,000 00
Amount at the commencement of 26th year	59,941 94
Six months' interest	1,798 25
	61,740 19
Six months' interest	1,852 20
	63,592 39
Twenty-seventh payment	1,000 00
Amount at commencement of 27th year	64,592 39
Six months' interest	1,937 77
	66,530 16
Six months' interest	1,995 90
	68,526 06
Twenty eighth payment	1,000 00
Amount at commencement of 28th year	69,526 06
Six months' interest	2,085 78
	71, 611 84
Six months' interest	2,148 35
	73,760 19
Twenty-ninth payment	1,000 00
Amount at commencement of 29th year	74,760 19
Six months' interest	2,242 80
	77.002 99
Six months' interest	2,310 08
	79,313 07
Thirtieth payment	1,000 00
Amount at commencement of 30th year	80,313 07

Brought over	80,313 07
Six months' interest	2,409 39
	82,722 46
Six months' interest	2,481 67
	85,204 13
Thirty-first payment	1,000 00
Amount at commencement of 31st year	86,204 13
Six months' interest	2,586 12
	88,790 25
Six months' interest	2,663 70
	91,435 95
Thirty-second payment	1,000 00
Amount at commencement of 32d year	92,435 95
Six months' interest	2,773 61
	95,227 56
Six months' interest	2,856 82
	98,084 38
Thirty-third payment	1,000 00
Amount at commencement of 33d year	99,084 38
Two months' interest	990 84
	$100,075 22

The whole $100,000 will be satisfied by means of the sinking fund payments and their accumulations in 33 years and 2 months.

13

No. 52

FILED
OCT 14 1884
JAMES H. McKENNEY
CLERK

114-663

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884, No. 52.

CALVIN AMORY STEVENS AND ANOTHER

vs.

THE CINCINNATI, CUMBERLAND GAP AND CHARLESTON RAILROAD COMPANY AND ANOTHER.

BRIEF AND ARGUMENT FOR APPELLEES.

CHS. F. SOUTHMAYD,
Of Counsel for Appellees.

Evening Post Job Printing Office, N. Y.

Brought over	80,313 97
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Supreme Court of the United States.

CALVIN AMORY STEVENS AND ANOTHER vs. THE CINCINNATI, CUMBERLAND GAP AND CHARLESTON RAILROAD COMPANY AND ANOTHER.	No. 52. October Term, 1884.

BRIEF FOR APPELLEES.

This is one of the "*Sold road*" cases.

For the arguments to show that the State bondholders never had any lien upon the railroad in question in this case, and that if they had, it was clearly subjected to be defeated and terminated by such proceedings as those in which the present holders acquired their title, we refer to the brief filed in the cases of the Memphis and Charleston Railroad Company and the East Tennessee, Virginia and Georgia Railroad, which briefs are likewise applicable to this case.

In addition to that brief we deem it necessary only to say, with reference to the special circumstances of this sold road case, as follows :

First.—All the State bonds loaned to the Cincinnati, Cumberland Gap and Charleston Railroad Company, were issued after the passage of the Act of March 20, 1860.

Second.—It is indisputable that when the bonds were issued, and at all times afterwards, the road was liable in virtue of the Act of February 21, 1856, to be sold out at the suit of the State, under legal proceeding for that purpose, in case the company should make default in the sinking fund payments.

Third.—The record shows that at the time of the sale under which the title is now held, and at the time of the institution of the suit under decree in which the sale was made, the Cincinnati, Cumberland Gap and Charleston Railroad Company was in arrear for its sinking fund payments. It *never* paid any of the installments it owed to the sinking fund (Record, page 999).

See also statements in record of amounts of the amount due upon the State bonds loaned to this company, and the amount realized by the sale of the road (Record, pages 1021–22).

Fourth.—This road proved to be of very small value, and nothing could be realized by the State by means of a Receivership of its income. After it was sold out, and bought by the East Tennessee, Virginia and Georgia Railroad Company, and had the benefit resulting from annexation to that company's system of roads, it still not only yielded no income, but failed to pay its operating expenses (Record, pages 530–31).

Such being the situation, as to this road, it is clear that it would fairly come within the powers reserved to the State under the twelfth section of the Internal Improvement Act to sell it out under appropriate proceedings, irrespective of the power to sell it out under the Act of February 21, 1856, because of non-payment of the sinking fund installments.

And it is clear enough that if the sale was permissible under legal proceedings authorized by the Act of February 21, 1856, or by the twelfth section of the original act, there was no occasion for or propriety in making the State bondholders parties to any such legal proceeding. The only necessary parties to such a suit were the State and the company, and the purchaser under decree in such a suit would indisputably acquire a good title, free from any claim of the State bondholders.

If the decree under which the sale of this road was made was one which could be made in such a suit between the State and the company, as is last above referred to, we do not understand the complainants as denying that the proceedings in that suit and the sale under the decree were sufficiently regular and effectual to vest a clear title in the purchase free from incumbrance. At all events, if they should make such a denial, we suppose that no argument on our side would be necessary to sustain the decree and sale and the title acquired thereunder. We make no such argument, because the appellants have not pointed out their objection, if any.

Fifth.—We do not deem it needful to discuss here at length the various questions which are raised as to the efficacy of the proceedings had in this suit, under which the sale took place, to the end of making the State bondholders, parties in legal effect to the suit, so as to conclude them by the decree under the principle of *res judicata, supposing that they had such interests* in the subject matter, and were so situated *as to make it necessary* that they should be in some way made parties.

The discussions upon these points are very elaborate, and involve numerous points of Tennessee local law and practice.

As those discussions on the side of the present holders of the sold roads will be thoroughly conducted by the gentlemen of the Tennessee bar who represent the great substantial pecuniary interests involved in the sold road discussed, and as the value of the Cumberland Gap Road is comparatively small, we leave the discussion in detail of this particular point (should it ever become necessary to a decision, which we can not imagine) to our Tennessee associates, claiming for our client here the benefit of the views they will present on this point.

Sixth.—The answer in this case sets up the defense of *adverse possession* for more than seven years next previous to the commencement of this suit, which term of adverse possession bars the suit under the Tennessee Statute of Limitations, and the record shows proof of such adverse possession for more than seven years, viz.: from November, 1871, to the commencement of this suit in 1879 (*Record, page* 978).

The portion of the answer setting up this defense is on pages 90–91 of the Record.

The Tennessee Statute of Limitations which bars the suit because of such adverse possession for seven years, will be found set forth in the Record, pages 132–33.

The more important sections of that act are as follows:

SEC. 2763. Any person having had by himself, or those through whom he claims, seven years' possession of any lands, tenements, or hereditaments granted by this State or the State of North Carolina, holding by conveyance, devise, grant, or other assurance of title, purporting to con-

vey an estate in fee, without any claim by action at law or in equity commenced within that time, and effectually prosecuted against him, is vested with a good and indefeasible title in fee to the land described in his assurance of title.

SEC. 2764. And on the other hand, any person and those claiming under him, neglecting for the said term of seven years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity, effectually prosecuted against the person in possession, as in the foregoing section, are forever barred.

We submit that thus, if the complainants ever had any claim, they are barred by the Statute of Limitations.

CHS. F. SOUTHMAYD,
Of Counsel for Appellees.

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CHS. F. SOUTHMAYD,
Of Counsel for Appellees.

114-663

114-663

Supreme Court U. S.
FILED
OCT 22 1884
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

CALVIN AMORY STEVENS and OTHERS, in behalf of holders of Tennessee State Bonds issued to the East Tennessee and Georgia Railroad Company,
vs.
THE EAST TENNESSEE, VIRGINIA and GEORGIA RAILROAD COMPANY.
} No. 55.

CALVIN AMORY STEVENS and OTHERS, in behalf of holders of Tennessee State Bonds issued to the Cincinnati, Cumberland Gap and Charleston Railroad Company,
vs.
THE CINCINNATI, CUMBERLAND GAP and CHARLESTON RAILROAD COMPANY.
} No. 52.

The appellees move the Court to dismiss the appeals in these cases for want of jurisdiction, in that they do not involve the requisite amount of five thousand dollars.

The bills are filed by complainants in behalf of themselves and other bondholders in like interest, but the interest of each complainant is entirely separate.

It is conceived that, for the purpose of determining the amount in controversy on the appeal, the amount due on the coupons sued for is the test. Applying this test, we submit that neither of these two cases involves the requisite amount. In No. 55, if the coupons held or claimed by all the complainants be added together, the amount may be

sufficient, although we cannot so concede, as the proof of holding, by some of the parties at least (whose inclusion is necessary to make up the amount), appears to us to be deficient, if not entirely wanting.

In No. 55, we submit that in no aspect is the required amount made up.

Schwed *v.* Smith, 106 U. S., 188.

CHAS. F. SOUTHMAYD,
Of Counsel for Appellees.

14-663

Supreme Court of the United States.

OCTOBER TERM, 1884.

Nos. 42, 54, and 55.

CALVIN AMORY STEVENS AND OTHERS

vs.

EAST TENNESSEE, VIRGINIA & GEORGIA RAILRoad Co. and Memphis and Charleston R. R. Co.

ADDITIONAL MEMORANDUM ON PART OF APPELLEES.

In pages 112 to 123 of my brief will be found an elaborate argument in relation to the words "holding and using" in the seventh section, and as to the reasons why the bonds paid in which had been issued to the particular company were directed to be cancelled, and all the other bonds to be kept alive; the purpose of which argument is to show that these things had reference merely to the proper regulation of the interest account between the company and the State, and had no reference whatever to any supposed lien attached to the bonds themselves.

This question is complex, and requires very careful attention for its correct understanding.

I was compelled to omit it in the oral argument for sheer want of time, and the same cause obliged me to *omit altogether* several distinct and important topics, and leave them to the brief.

For refutation of General Swayne's extraordinary statement, that if we were held liable to pay the complainants' claim, it would not subject us to a loss, but merely compel us to surrender the profits which he alleges we have made, I desire to refer the Court to the following figures, taken from the record in the East Tennessee, Virginia & Georgia Rail Road case:

The State bonds cost us, in cash, 55 per cent., (Record, page 490,) although by the time we paid them over to the State, in June, 1870, the price had risen to 61. (Record, page 1129.)

But to get the money with which to buy the State bonds we had to sell our own substitution bonds at the average discount of $16\frac{40}{100}$ per cent., thus bringing the cost up to $71\frac{40}{100}$ per cent. But the new bonds we issued bear 7 per cent. interest, while the Tennessee State debt, which we retired before maturity, bore only 6 per cent., and we thus increased our annual interest charge by one-sixth, for the term of 30 years that our new bonds had to run.

Record p. 533-6.

If a proper allowance for this were made, upon an accurate computation for ascertaining "present worth," I think it would be found to carry the actual cost to us of this settlement of the Tennessee State debt beyond eighty per cent.

The compromise Tennessee is offering to her individual

creditors, is fifty per cent. in new bonds, bearing 3 per cent. interest, which sell at forty per cent., thus netting the creditor twenty per cent.

But if these cases were decided against the railroads, we should have little or no prospect of getting even the twenty per cent. The repudiationists would declare that this Court had decided that this debt was the debt of the railroads and not of the State, and that the honest yeomanry of Tennessee must never tax themselves to pay the debt of the railroads.

I should not deem it worth while to notice the assertion that Mr. Stevens' speculation was for the benefit of his family and not of himself individually, if it had not been stated by counsel that I knew this to be the fact, and disregarded or suppressed it when making my statement. As to this, I have merely to say that, if such be the fact, I never heard of it before, and the record shows no such fact; but the contrary. Mr. Stevens' own testimony was that the bonds, originally belonging to his father, were given to him by his father shortly before his death, to the amount of $110,000. (Record, pages 324–325, 268.) And on page 331 he testifies as follows: "The bonds sued on in these cases include no bonds given me by my father, but bonds I purchased and paid for myself since 1874."

For the refutation of the extravagant statements of counsel as to the alleged difference in price or value between the old and new bonds, or *ante bellum* and *post bellum* bonds, I need only to refer to the schedule of prices of bonds of the two classes, admitted by stipulation to be correct, which will be found on pages 1129 to 1133 of the record, from which it will be seen that in the years, when the railroads were making these settlements with the State, there was no material

difference in price, though the two classes of bonds were called and sold on the exchange separately.

The prices in 1870, '71, '72, '73, and '74, are given by the months separately. The difference rarely amounted to as much as one per cent., and in some months the average price of the new is actually a small fraction above that of the old bonds.

Gen. Swayne's suggestion, that the railroad companies are morally responsible for the State's repudiation, hardly deserves an answer.

The message, extracts from which he read to the court, is a message sent in in the year 1879, eight years after our main settlement with the State was made, by Governor Marks, who has been the head and front of the repudiation movement, and contains an elaborate statement of the pretended grounds upon which he seeks to justify the repudiation which he advises.

The most striking features of this document are—

1. A tirade of abuse against the United States Government, who, he says, ought to be made to pay the amount of the interest on the debt which accumulated during the war, and likewise to pay for the damage to the railroads by carrying off the iron, etc., etc., and he advises a partial payment to the bondholders by assigning to them this valuable claim against the United States.

2. Romancing statements in relation to the issue of the *post bellum* bonds, resting on no evidence, and the falsity of which was explained in the argument of Judge East, exhib-

iting the wreck and ruin of the railroads wrought in the war and the absolute necessity of rebuilding them in large measure unless they were to be abandoned as worthless.

CH'S F. SOUTHMAYD,
Of Counsel for Appellees.

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No. 45-47-48-44x3

Office Supreme Court U. S.
FILED
OCT 15 1884
JAMES H. McKENNEY,
CLERK.

114-663

SUPREME COURT OF THE UNITED STATES.

Calvin Amory Stevens

vs.

Louisville & Nashville Railroad Company.
Nashville & Decatur Railroad Company.
Memphis, Clarksville & Louisville Railroad Co.

ARGUMENT FOR APPELLEES.

ED. BAXTER, of Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

CALVIN AMORY STEVENS

vs. } No. 45.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

CALVIN AMORY STEVENS

vs. } No. 47.

NASHVILLE & DECATUR RAILROAD COMPANY.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

CALVIN AMORY STEVENS

vs. } No. 48.

NASHVILLE & DECATUR RAILROAD COMPANY.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

CALVIN AMORY STEVENS

vs. } No. 44.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

CALVIN AMORY STEVENS

vs. } No. 43.

MEMPHIS, CLARKSVILLE & LOUISVILLE RAILROAD COMPANY.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

STATEMENT OF CASE.

In January, 1879, the appellant, Stevens, filed bills in the first three causes in the United States Circuit Court for the Middle District of Tennessee at Nashville; and in the last two causes he filed bills in the United States Circuit Court for the Western District of Tennessee at Memphis.

In the first cause he averred, that he was the owner of 14 out of 434 bonds outstanding, of the denomination of $1,000 each, issued by the State of Tennessee, and loaned to the Louisville & Nashville Railroad Company, under an act of the Legislature of said State, passed February 11, 1852; he claimed that under said statute, said bonds were a lien upon the railroad of said company, and upon all the property, income, rights, privileges and franchises of said company within the State of Tennessee; he prayed that said lien be established above all other claims and demands, as constituting the first and paramount incumbrance on said property and rights; that the income of said property be applied to the payment of interest accrued, and to accrue on said bonds, and that said property be placed in the hands of a receiver, to be administered according to the liens and trusts declared upon it, and for general relief. (L. & N. Trans. p. 1, 17, 21.)

In the second cause, he averred that he was the owner of 13 out of 533 bonds outstanding, of $1,000 each, issued by said State under said statute, and loaned to the Tennessee & Alabama Railroad Company (N. & D. and Tenn. & Alabama Trans. p. 17); and in the third cause he averred, that he was the owner of 13 out of 423 bonds outstanding, of $1,000 each, issued by said State under said statute, and loaned to the Central Southern Railroad Company (N. & D. & C. S. R. R. Trans. p. 17); that in 1868, said Tennessee & Alabama Railroad Company, and said Central Southern Railroad Company, were consolidated with the Tennessee & Alabama *Central* Railroad Company, under the name of the Nashville & Decatur Railroad Company, and that the consolidated company in 1872 leased its road and franchises to the Louisville & Nashville Railroad Company for a term not yet expired. (N. & D. & Tenn. & Ala. R. R. Trans. p. 2).

The object of the bills in the second and third causes, is to have the supposed lien of the bonds owned by appellant established, and to obtain a receiver of so much of the Nashville & Decatur Railroad as formerly belonged to the Tennessee & Alabama Railroad Company, and the Central Southern Railroad Company, and to appropriate the respective incomes thereof, to the payment of the interest upon the bonds owned by appellant that were loaned by the State to those companies respectively.

In the fourth cause he averred, that he was the owner of 30 out of 1335 bonds outstanding, of $1,000 each, issued by said State, under said statute, and loaned to the Memphis & Ohio Railroad Company (L. & N. & Mem. & O. R. R. Trans. p. 17); that in 1867, said company leased its road and franchises to the Louisville & Nashville Railroad Company, and in 1872, was consolidated and merged into said last named company (L. & N. &. Mem. & O. R. R. Trans, p. 2). The object of the bill in said cause, is to have the supposed lien of the said bonds owned by appellant established, and to obtain a receiver of so much of the consolidated road as was formerly owned by the Memphis & Ohio Railroad Company, and to appropriate the income thereof, to the payment of the interest upon the bonds owned by appellant, that were loaned by the State to said company.

In the fifth cause he averred, that he was the owner of 30 out of 996 bonds outstanding, of $1,000 each, issued by said State, under said statute, and loaned to the Memphis, Clarksville & Louisville Railroad Company (L. & N. & M., C. & L. R. R. Trans. p. 17); that in 1871 the road, property, and franchises of the Memphis, Clarksville & Louisville Railroad Company were sold by the Chancery Court at Nashville, Tenn., under a decree obtained by the State of Tennessee to enforce the lien reserved by said Act of February 11, 1852, and were purchased by the Louisville & Nashville Railroad Company. (L. & N. & M., C. & L. Trans. p. 29).

The object of the bill in siad last named cause is to have the supposed lien of the bonds owned by appellant established; to obtain a receiver of the road formerly owned by the Memphis, Clarksville & Louisville Railroad Company; and to appropriate the income thereof to the payment of the interest upon the bonds owned by appellant, and loaned by the State to said Company.

Said bills were filed by him not only on his own behalf, but also on behalf of all other holders of like bonds who might join in the prosecution of the suits.

Eugene Kelly, Jno. T. Terry, and Peter Geddes filed petitions claiming to be the owners of bonds loaned to the Memphis & Ohio Railroad Company, and to the Louisville & Nashville Railroad Company respectively, and the said Terry filed a petition claiming to own bonds loaned to the Memphis, Clarksville &

Louisville Railroad Company; but though they were made parties, none of them offered proof of the allegations contained in their petitions; and Stevens failed to prove that he owned any bonds that had been loaned to the Mem. & O. R. R. Co., or to the M., C. & L. R. R. Co.

In all of the causes the defendant railroad companies answered denying that the lien reserved by the Act of February 11, 1852, belonged to the holders of the bonds issued by the State; insisting that said lien was given for the sole purpose of securing to the State the repayment of the bonds borrowed from the State by the respective companies, and averring that the State had been fully paid for all the bonds loaned to any of the defendant companies except the Memphis, Clarksville & Louisville Railroad Company, and as to those bonds, that the State had foreclosed its lien by a sale under a decree of the Chancery Court at Nashville, at which sale the Louisville & Nashville Railroad Company had become the purchaser of the Memphis, Clarksville & Louisville Railroad, with all its property, rights, privileges and franchises. Replications were filed to all of said answers.

In the first cause Jno. B. Smith was permitted to come in as a party-defendant, and he filed an answer and cross-bill in which he averred that after the Louisville & Nashville Railroad Company had paid the State for the bonds loaned to said company by the State, said company had executed two mortgages upon its road and property to secure in the aggregate $12,000,000 of bonds of said Company, and that in each of said mortgages he had been appointed one of the trustees. He prayed that the court declare and decree that said mortgages, were, in respect to the claim of appellant and of all other holders of the bonds of the State of Tennessee, originally loaned to said company, the best and only liens and incumbrances, in their order, on said road and property; that in respect to his title as trustee under said mortgages, and in respect to the equity of the holders of the bonds secured by said mortgages, it be declared and decreed that the lien originally reserved by the State had been effectually discharged and released; that he be quieted in his title as trustee, and that appellant be perpetually enjoined from thereafter setting up his claim against said road.

In the second and third causes Charles Diggelman and others were permitted to come in as parties-defendant, and filed answers and cross-bills, in which they averred that the Nashville & Decatur Railroad Company had executed a mortgage on its road, property, rights, privileges and franchises to secure $2,100,000 of bonds; that one of the objects of the mortgage was to enable said company to pay its indebtedness to the State of Tennessee for bonds loaned by said State to said company, or to the original companies consolidated under that name, as said company was authorized to do under the laws of said State; that the bonds issued under said mortgage were sold for full value to *bona fide* purchasers, and the proceeds were used in the purchase of bonds and coupons of said State, which were accepted by said State in payment of the debt due to the State from said company for bonds loaned by the State to said company, or to the original companies consolidated into that company; that they (respondents) owned and represented over $500,000 of the bonds issued under said mortgage; and they prayed that it be declared and decreed that said mortgage was in respect of the claim of appellant, and of all other holders of the bonds of the State of Tennessee originally loaned to the Tennessee & Alabama Railroad Company, and to the Central Southern Railroad Company, the best and only lien and incumbrance on the property therein described; that the lien originally reserved by the State of Tennessee to itself on account of its bonds loaned to said railroad companies, be decreed to have been effectually transferred to and for the benefit of the holders of said mortgage bonds of the Nashville & Decatur Railroad Company; that respondents and the other holders of said mortgage bonds be quieted in their title under said mortgage; and that appellant, and all other holders of bonds of the State of Tennessee loaned to said railroad companies, be perpetually enjoined from thereafter setting up their claim as against said respondent.

In the fourth cause the said Jno. B. Smith was permitted to come in as a party-defendant, and he filed an answer and cross-bill, in which he averred that after the Memphis & Ohio Railroad Company had paid the State for the bonds loaned to said company by the State, said company had executed a mortgage upon its road and property, to secure $3,500,000 of bonds; that after said company was consolidated into the Louisville & Nash-

ville Railroad Company, the last named company had executed a mortgage upon, among other things, the road formerly owned by the Memphis & Ohio Railroad Company to secure $4,000,000 of bonds issued by the Louisville & Nashville Railroad Company; and that in each of said mortgages he had been appointed one of the trustees. He prayed for relief in said cause, similar to the relief which he prayed in the first cause.

In the fifth cause the said Jno. B. Smith was permitted to come in as a party-defendant, and he filed an answer and cross-bill, in which he averred that after the Memphis, Clarksville & Louisville railroad had been purchased by the Louisville & Nashville Railroad Company, under the decree of the Chancery Court at Nashville, ordering the sale to enforce the State's lien upon said road, the said Louisville & Nashville Railroad Company had executed two mortgages upon, among other things, the road formerly owned by the Memphis, Clarksville & Louisville Railroad Company; that said mortgages were made to secure in the aggregate about $6,500,000 of bonds issued by the Louisville & Nashville Railroad Company, and that he had been appointed one of the trustees in each of said mortgages. He prayed for relief in said cause similar to the relief which he prayed in the first and fourth causes named above.

Answers were filed by appellant to all of said cross-bills, and replications were filed to said answers.

All of the above named causes were, with certain other similar causes, heard together at Nashville before Hon. S. L. Withey, upon pleadings, proof and argument of counsel, when he decreed that the equity was with the defendant railroad companies; that complainants were not entitled to the relief prayed for; that the mortgages upon the railroads involved in said causes, executed after the debts due to the State of Tennessee, for bonds of the State loaned to said companies had been paid, were the best and only liens in their order on said roads; that the lien originally reserved by the State of Tennessee upon said roads, on account of its bonds loaned to said companies, had been effectually discharged and released; that the trustees and bondholders, claiming under the mortgages executed by said companies, after the said companies had paid their debts to the State, be forever quieted in their titles against the claim of the appellant and of all other holders of like bonds of the

State of Tennessee originally loaned to said companies, and that they be perpetually enjoined from thereafter setting up their claims aforesaid, and that the bills be dismissed at the cost of the complainants; from which decrees the complainants prayed appeals.

Shortly after the hearing before Judge Withey, two other causes involving the same questions were heard before Judge Hammond, in the United States Circuit Court at Memphis, and he having decided them in the same way, the complainants in those causes have also appealed to this court.

ARGUMENT.

I.

The contention of appellant's counsel is to the effect that "the 3rd and 4th sections of the Act of February 11, 1852, constitute the bonds themselves, in whosoever hands they may be found, a lien in favor of the State of Tennessee, as trustee for the bondholders, in the nature of a mortgage without a deed, securing the payment by the railroad companies to such holders of said bonds with the interest thereon, as the same becomes due." (Appellant's Brief, pages 169–170).

They contend that the object of said statute was to furnish security to the bondholders as well as to the State, or, in other words, to require the companies to pay the bondholders, and in that way to provide indemnity to the State. (Appellant's Brief, p. 171).

They assume that the State had no interest of its own to subserve by promoting the transactions in aid of which the bonds were issued; they assume that the bonds were issued at the urgent solicitation of the railroad companies, and for their benefit alone; that the companies not only received the proceeds of the sales of the bonds, but that they realized all of the other advantages that were derived from the system of internal improvements established by said statute; that the bonds, though in form the obligations of the State, are in reality the obligations of the railroad companies; that said companies are bound, as the principal obligors, to pay said bonds and interest to the holders, and that the State is to be treated throughout as the mere accommodation maker of said bonds. (Appellant's Brief, p. 173–216).

It seems to me that appellant's counsel are in error upon each of the points stated above, and that they have been led into error by following three vicious modes of statutory construction.

First. They have insisted upon construing the Act of February 11, 1852 as though it inaugurated the first and only system of internal improvements which had ever been attemped in Tennessee; whereas, three other systems had been previously inaugurated, and abandoned, and the system of 1852 was intended to be a radical change from the one which had immediately preceded it.

Second. They seize upon a single expression to be found in the 3rd and 4th sections of the Act of February 11, 1852, and insist upon that expression controlling the rights and liabilities of the parties, without looking to the whole scope and tenor of the statute, to ascertain the qualifications and limitations that were placed upon the expression upon which they rely.

Third. They disregard the practical contemporaneous and subsequent construction placed upon the Act of February 11, 1852, by the bondholders, by the railroad companies, and by the executive, legislative, and judicial departments of the State of Tennessee.

II.

The first system of internal improvements in Tennessee, was attempted by an Act passed January 2, 1830. It contemplated the appropriation of money from the State Treasury, to be expended in public works of internal improvement, to be constructed under the superintendence of a Board of Commissioners to be elected by the Legislature, and of which Board the Governor was to be *ex officio* President (L. & N. Trans. p. 1609). This system, as might have been expected, was found to be extravagant and inefficient, and was soon abandoned.

III.

The second system was established by an Act passed February 19, 1836, entitled "an Act to encourage internal improvements in this State." It provided, that in all cases where any joint stock company should be incorporated by the State, for the purpose of constructing a railroad or turnpike within the State, and two-thirds of its capital stock should be subscribed by individuals, and in the opinion of the Governor and of certain other State officers, should

be well secured, the Governor should subscribe, on behalf of the State, for the remaining one-third of such capital stock, and should issue the bonds of the State, payable twenty-five years after date, to the President and Directors of such company, bearing 5¼ per cent. interest per annum, payable at the office of the State Treasurer. The bonds were received by the companies in payment of the State's subscription, and when sold, the proceeds were used by the companies in the construction of their roads.

The Act contained this express provision: "*That the said company or companies shall agree and stipulate to pay the interest semi-annually as the same shall accrue and be payable.*"

It was further expressly provided: "That until the redemption of said bonds, the dividends declared on the stock of the State, except so much as shall have been applied to the payment of the interest as above set forth, shall be regularly paid over to the Treasurer of the State, by him to be applied to the redemption of said bonds." (L. & N. Trans. p. 1613).

Notwithstanding the fact that said bonds were made payable to said companies, and were sold and assigned by them, and the proceeds of the sales were received by them, and used by them in constructing their roads; and notwithstanding the fact that the companies expressly agreed to pay the interest semi-annually as it accrued, no attempt was ever made by the holders of said bonds to compel said companies to pay said interest. Such payments of interest as the companies did make, they made to the Treasurer of the State, and he paid the interest upon the State bonds to the holders thereof.

Notwithstanding the fact that the dividends upon the stock of the State were to be paid to the State Treasurer, to be applied by him to the redemption of said bonds, no attempt was ever made by any bondholder to subject said dividends, as a trust fund in his hands, to the payment of the bonds. It was regarded as a transaction exclusively between the State and the companies, and the bondholders looked alone to the State for the payment of the principal and interest of the bonds.

By an act passed January 19, 1838, the State's subscription was increased from one-third to one-half of the capital stock of all the railroad and turnpike companies in the State. This act, however, required that the individual subscriptions should not only be well

secured, but that a cash payment of ten per cent. upon them should be made before the State could be called upon to subscribe.

It was provided that from the date of the State's subscription by the Governor, *the State should have a lien* upon the property of each individual stockholder to the amount of the stock owned by him, to continue until he should have paid one-half of his subscription.

It was also provided that *the State should have a lien on the entire works of said companies*, respectively, for the amount so paid in by the State, and all the profits, rents, and tolls of said companies were to inure to the benefit of the State, until the individual stockholders should have paid in their entire stock in said companies respectively.

The statute required the Governor to issue the bonds of the State in payment of the State's subscription, and the bonds were to be payable thirty years after date, with five per cent. interest, payable semi-annually at the office of the Treasurer of Tennessee, *or at such other places as the President and Directors negotiating the same might designate.*

By the same statute, a bank was established in the name and for the benefit of the State, to be known as the Bank of Tennessee. The capital was to be $5,000,000; the State was to be sole stockholder; all the officers of the bank were to be appointed by the State; and the faith and credit of the State was pledged for the support of the bank. The officers of the internal improvement companies, to whom bonds of the State might be issued under the act, were required to notify the bank of the places at which the interest on said bonds was payable, and the *bank* was required to provide for the payment of said interest "*out of the dividends of the bank.*" In the event the dividends of the bank, and the profits arising from the stock of the State in said internal improvement companies, should prove insufficient to liquidate the interest on the bonds of the State issued to said companies, the Governor was required to notify said companies, three months before the interest would become due, of the probable deficit, and of the amount which would be required of each company *to be paid in order to meet the interest on the bonds of the State*, which amounts were to be paid at the time, place, and manner required by the Governor; and upon failure by any of said companies to meet the installment thus re-

quired, the individual stockholders of such companies were to forfeit all their interest therein. (L. & N. Trans. p. 1615).

Some stress has been laid upon the fact that the Act of February 11, 1852, directed that the bonds now in controversy should be made payable at such places as the President of the company receiving them might designate, and it has been argued that the company was allowed to designate the place of payment so that the company might know where to make payment to the holders of the bonds and coupons; but when we find that the requirement referred to was borrowed from the Act of January 19, 1838, which directed, however, that the interest on the State bonds should be paid to the holders by the Bank of Tennessee, and not by the companies, we see that the requirement cannot be regarded as any evidence whatever that the companies were expected to pay the interest to the bondholders.

In discussing the meaning of the 5th section of the Act of February 11, 1852, which requires the companies to deposit in the Bank of Tennessee, at Nashville, at least fifteen days before the interest becomes due from time to time, upon the bonds issued to them, an amount sufficient to pay such interest, much controversy has arisen as to the true status intended to be conferred upon the bank by that section. It has been argued that the bank was the agent of the railroad companies, and not of the State, and in the event the bank had failed, the loss would have fallen upon the railroad companies, and not upon the State, nor upon the bondholders.

We see, however, that this provision of the Act of February 11, 1852, was substantially borrowed from the Act of January 19, 1838. Instead of requiring the companies to pay into the Bank of Tennessee an amount of money sufficient to pay the interest upon the bonds issued to them respectively, the Act of 1838 required them to pay their respective proportions of such sums as might be necessary to make up the deficit, after exhausting the dividends of the bank, and the profits arising from the stock of the State in said companies.

Instead of allowing the companies to wait until within fifteen days of the maturity of the interest, the Act of 1838, section 20, required the Governor to give them three months' notice of the amount that they would respectively be required to pay, and those amounts were to be paid at such time as the Governor might direct.

One objection to the Act of 1838 was that the companies could never know how much they would be required to pay "to meet the interest on the bonds of the State," until the probable deficit referred to in that act could be ascertained. And another objection was, that after such deficit was ascertained, the Governor could fix the time of payment by the companies to suit himself, without consulting them. Both of these objections were remedied in the Act of February 11, 1852, which fixed the amount to be paid by each company at a sum equal to the interest upon the bonds loaned to it, and fixed the time of payment at fifteen days before the interest would mature upon the bonds. In the event the companies failed to make the payments required by the Act of 1838, the only remedy reserved to the State was to have the stock of the individual shareholders forfeited; whereas, under the Act of February 11, 1852, if the companies failed to pay the interest to the bank, the State reserved the right to appoint a Receiver to take charge of, and operate the roads.

The fifth section of the Act of February 11, 1852, is, therefore, a mere modification of the 20th section of the Act of January 19, 1838, and no one has ever contended that the railroad companies to whom bonds were issued under the last-named act were liable to pay the interest thereon to the bondholders. On the contrary, their payments to the State, made as required by the 20th section of said act, have always been treated as a full discharge of that part of their contract.

If such be the correct construction of the 20th section of the Act of 1838, a similar construction ought to be placed upon the 5th section of the Act of February 11, 1852.

We find in the Act of January 19, 1838, the origin of the expression "State lien," which was used so often afterwards in the legislation of Tennessee. We find that it was a lien reserved upon the property of the individual stockholders, and also upon the entire works of the companies.

The lien reserved by the Act of February 11, 1852, while it was reserved upon the entire works of the companies, and upon the stock owned by the individual stockholders, was not imposed upon the other property of the stockholders. The lien of the State, as reserved by the Act of 1838, has at all times been regarded as the exclusive property of the State. No bondholder has ever attempted to enforce the lien reserved by the State under that Act, either

against the property of the individual stockholders, or against the works of the companies to whom bonds were issued under that Act.

One of the companies to whom bonds were issued under the Act of 1838, was the Memphis & LaGrange Railroad Company, a company that failed in its undertaking, and was succeeded by the Memphis & Charleston Railroad Company; and on January 25, 1850, an act was passed authorizing the Governor to appoint commissioners to assess the value of the State's interest in the Memphis & LaGrange Railroad, and he was further authorized to convey said interest to the Memphis & Charleston Railroad Company, with all rights and liens in favor of the State in relation thereto, against the private stockholders, upon certain terms specified in the act. (L. & N. Trans., p. 1616).

The Memphis & Charleston Railroad Company took possession of said railroad and has operated it for many years, and no holder of bonds issued by the State to said Memphis & LaGrange Railroad Company, under the Act of 1838, has ever asserted any lien upon said road, nor questioned the right of the State to dispose of its lien in the manner in which the State undertook to do it.

On the 5th of February, 1842, an act was passed, the second section of which required the Comptroller of the State to prepare a book, in which he should register the bonds of the State theretofore issued, or which might thereafter be issued, showing the amount of the bonds issued to each company, together with the number, letter, and date of each bond, and in order to enable him to prepare said register, he was to have access to the register kept in the Bank of Tennessee, where the description of said bonds had previously been kept. (L. & N. Trans., p. 1654–1655).

Upon the argument of these causes, reference has been made to an act passed February 21, 1852, requiring the Secretary of State to take a receipt, reciting the number, date and amount of bonds loaned to the railroad companies under the different acts of the Legislature passed at that session. (L. & N. Trans., p. 1843.)

It has been urged that the object of the passage of the last named act was to enable the bondholders to trace the bonds, by their numbers, to the companies to whom they were originally loaned; and yet it is manifest that there could have been no such object in passing the Act of February 5, 1842, because it has never been claimed that the bonds referred to in that act were liens upon

the roads of the companies to whom they were issued. The object of both acts was evidently the same, viz.: to preserve in the State archives a registry of the bonded indebtedness of the State. The registry required by the Act of February 5, 1842, of the bonds issued under the internal improvement system of 1836–8, was precisely the same as that required by the Act of February 21, 1852, of the bonds issued under the system of that year, except that in the one case the registry was to be made by the Comptroller, while in the other case it was to be made by the Secretary of State. The system of internal improvements established in 1836–8, was afterwards abandoned by the State, as impracticable and unwise.

IV.

The third system of internal improvements was established by an act passed February 4, 1848. (L. & N. Trans., pp. 1668–1671).

Instead of the State subscribing to the capital stock of the companies, the Governor was authorized to endorse and guarantee, in the name and on behalf of the State of Tennessee, $500,000 of the bonds of the Nashville & Chattanooga Railroad Company, and $350,000 of the bonds of the East Tennessee & Georgia Railroad Company. Before said endorsements or guarantees should be made, it was to appear that valid and solvent subscriptions to a certain amount had been made to the capital stock of said companies, and that a certain number of miles of each of said roads had been completed and were in operation, and the Board of Internal Improvements was required "to take as satisfactory indemnity, to save the State against the payment of either principal or interest on said bonds," before the same were issued, a lien, first, upon the whole stock of the company, and second, upon the road and fixtures, as built and put in operation.

Appellant's counsel contend that the liabilities of the railroad companies upon the bonds loaned to them by the State under the Act of February 11, 1852, are precisely the same in effect, as if the companies had themselves executed the bonds. The exact language used by appellant's counsel, in discussing the nature of the contract contained in the Act of February 11, 1852, is as follows: "But the written contract (of the companies) is to pay the bonds and the interest as they mature, not after they mature; to pay the creditor,

not to reimburse the State after it has paid." (Appellant's Brief, p. 239).

If the written contract of the companies, as contained in the Act of February 11, 1852, was to pay the bonds and the interest to the bondholders, in what respect did such a contract differ from the contract contained in the Act of February 4, 1848? Certainly the companies whose own bonds were to be endorsed under the provision of that act, agreed to pay the bonds, and the interest thereon, to the holders thereof; and if their obligations under the Act of February 11, 1852, were to be precisely the same, it is difficult to see why that Act was ever passed at all. The same object could have been accomplished by amending the Act of February 4, 1848, so as to authorize the companies named in the Act of February 11, 1852, to issue their own bonds, and to have them endorsed by the State.

This is precisely what Mr. Wisener proposed to do, in the motion which he made when the Act passed January 15, 1852, was under discussion—an act which, in some of its features, was identical with the Act of February 11, 1852. This motion of Mr. Wisener is very much relied upon by appellant's counsel to sustain their proposition that the lien reserved by the Acts of January 15 and February 11, 1852, was a lien to secure the payment of the bonds and interest by the companies directly to the bondholders, and not a lien for the mere indemnity of the State.

Mr. Wisener's motion was to "refer the bill to the Committee on Internal Improvements, with instructions to so amend the same, as to authorize the company to issue their bonds for the amount authorized by the bill, and the Governor to endorse and guarantee the payment of the same, on the part of the State, with like restrictions, securities, liabilities and guarantees for indemnity, as were provided in said bill for the payment of the bonds and interest thereon authorized to be issued by said bill." (Appellant's Brief, p. 10).

The bill then before the Legislature proposed that the State should issue its own bonds and loan them to the companies, reserving a lien to secure (as we contend) the repayment of the bonds and interest thereon by the companies to the State. This Mr. Wisener was unwilling to vote for. He preferred that instead of the State issuing its bonds, and reserving a lien to secure their repayment by

the companies to the State, the companies should issue their own bonds, as they were required to do under the Act of February 4, 1848, and that the State should become bound as a mere endorser, as it had done under that act. He wanted the same lien retained for the indemnity of the State as such endorser, that the act proposed to retain to secure the repayment of the bonds and interest by the companies to the State. The fine distinction which appellant's counsel have drawn between "contracts to pay, and contracts to indemnify by payment," was not present to his mind. The only distinction that he was drawing, was the practical distinction between the State issuing its bonds, and requiring the companies to issue their bonds. He preferred that the bonds to be issued should be the bonds of the companies and not of the State, and that the State's liability to the holders should be only that of endorser or guarantor, and when the Legislature rejected his motion, it was equivalent to deciding that the bonds to be issued under the Acts of January 15 and February 11, 1852, should not be the bonds of the companies, but the bonds of the State; that the State should be liable as principal upon the bonds, and not as mere endorser; that the State should agree to pay the bonds and interest to the bondholders, and look to the companies for repayment of the bonds loaned to them by the State, and that the companies should not be mentioned in the bonds nor known to the purchasers thereof.

As we construe Mr. Wisener's motion, the rejection of it by the Legislature of 1852 is plenary proof that the Legislature intended in the passage of the Acts of January 15 and February 11, 1852, to make a radical departure from the policy embodied in the Act of February 4, 1848, and the reason for this change of policy is shown by the oral testimony in the record.

The bonds which the State endorsed for the Nashville & Chattanooga Railroad Company and the East Tennessee & Georgia Railroad Company, under the Act of February 4, 1848, though secured by the lien reserved in said act, did not sell for as much as the straight bonds of the State bearing the same rate of interest, and without any lien or mortgage to secure them (see L. & N. Trans., pp. 823–4); the difference in favor of the straight unsecured bonds of the State ranging from one to three per cent. (L. & N. Trans., p. 863).

V.

The fourth and last system of internal improvements established in the State of Tennessee was created by the acts passed at the session of 1851–2. Before examining those acts in detail, it will be well to glance briefly at the condition of the State of Tennessee at that time, and at the circumstances which surrounded the Legislature by which those statutes were passed. We have seen that when the State attempted to develop her internal resources by direct appropriations from her own treasury, the appropriations were squandered upon useless projects, and the plan was speedily abandoned. We have seen that when she invited her own citizens to organize internal improvement companies, and offered to subscribe liberally herself to the capital stock of such companies, it was found that it was impossible for her to properly protect her interests as a stockholder in such companies, and that plan was also abandoned. We have seen that her next attempt was to invite foreign capital by offering to endorse and guarantee the bonds of two of her leading railroad companies, secured by a lien upon the roads, supposing that such endorsement would be all that could be desired. It was soon discovered, however, that while capitalists were willing to purchase the primary obligations of the State, they were not willing to invest in her endorsements except at a heavy discount.

The objection to the endorsed bonds did not grow out of any distrust of the ability of the State to make good her endorsements, but it grew out of the fact that States, as well as individuals, are disposed to be more prompt in the discharge of their own obligations, than they are in the discharge of the obligations of others, for whom they are bound as mere endorsers. The capitalists of that day, with prophetic vision, foresaw that if the people of the State were allowed to feel that the liability of the State was merely secondary in its character, and that the State could not be called upon to pay the bonds until the property of the railroad companies was exhausted, the people would insist upon the bondholders resorting to the railroad companies in the first instance, and would refuse to pay the bonds of the State until the liability of the companies was settled and enforced. That the capitalists of that day were correct in their views, is proven by the fact, that from the moment the bondholders of the present day announced their discovery that the railroad companies were the primary debtors upon the bonds,

and that the State stood merely as surety for the companies, the people of Tennessee have steadily refused to pay, or adjust the bonded indebtedness of the State, until the question shall have been decided by this court.

Gov. Marks, in his message to the Legislature of 1879, soon after these suits were brought, said: "The question as to the lien of the bondholders is now pending in the courts." . . . . . "As to that branch of the debt comprising the bonds issued to solvent railroad companies, it is not probable any adjustment of it can be made until the question is settled. (L. & N. Trans. pp. 1447–1451).

The capitalists of 1852 were wiser than the present holders of the bonds; they were anxious that no such pretext should be left to the people of the State; they were willing enough to purchase the bonds of the State, at or above par, for the State had never defaulted upon the principal or interest of any of her obligations; they did not object to the State's requiring such lien, or other security, as it saw proper to demand from the railroad companies to whom the bonds were loaned, provided such lien or security did not assume such a form, as would, in its effect, give rise to the future contention that the railroad companies were to be looked to in the first instance for the payment of the bonds.

If it had been stated upon the face of the bonds issued by the State of Tennessee under the Acts of 1852, that though in form they were the primary obligations of the State, the bondholders were to look to the railroad companies for the payment of the principal and interest, and that the State was not to be expected to pay, until the lien reserved in said statutes had been enforced by the bondholders, the bonds could not have been sold above the price that had been paid for the endorsed bonds issued under the Act of February 4, 1848. In fact, considering the number of bonds that it was proposed to issue under the Acts of 1852, I doubt if they could have been sold within twenty per cent. of the price that had been obtained for the small amount of bonds that were endorsed under the last mentioned act.

If the idea which has been advanced for the first time within the last few years—that the Acts of 1852 intended to require the railroad companies to pay the principal and interest of the bonds directly to the holders, and that the lien retained by those acts was intended for the benefit of the bondholders—had been advanced in

1852, it would have thwarted the very object which all of the parties then had in view, for it would have been equivalent to saying that the railroad companies were, in fact, the principal debtors, and that the State, as surety, had the right to demand that the bondholders should first exhaust the railroad companies and their property.

Besides, the credit of the State of Tennessee was such at that time, that the personal responsibility of the railroad companies, and the proposed liens upon their roads, would have added nothing to the market value of the straight bonds of the State. None of the companies mentioned in the Acts of 1852 had been incorporated for more than a few years, and several of them were incorporated at that session. None of them had completed their roads, and only three or four of them had constructed any part of them. The future success of all of them was, therefore, in the highest degree problematical.

Whatever confidence the State of Tennessee may have had in the railroad system that she was attempting to develop, it certainly could not have been fully shared by foreign capitalists, who are not in the habit of investing their money in the construction of local roads, situated far in the interior, and with no important connections near at hand. That the capitalists of 1852 did not desire any security other than the faith and credit of the State of Tennessee, and that they did not attach the slightest importance to the lien retained by the Acts of 1852, is proven by the facts contained in the stipulation of counsel, agreed to be taken as proof in these causes.

It is stipulated that up to the passage of the Internal Improvement Law of February 11, 1852, the State of Tennessee had never defaulted upon the interest of her public debt, and that the straight six per cent. bonds of the State were quoted on the New York Stock Exchange at prices ranging from 102 on February 24, 1852, to 106 on December 9, 1852; that in 1852 the taxable property of Tennessee was $177,420,305.00; that the debt of the State then amounted to only $3,992,856.66, and that the rate of State tax was only 11½ cents on the $100.00.

It is further stipulated that in reference to the bonds of the State of Tennessee loaned to the railroad companies involved in these causes, as a general proposition, subject probably to some exceptions, the purchasers of said bonds did not know, when they pur-

chased the same originally, to what companies they had been issued, and that there was no difference in the money market between the prices of the bonds loaned to railroads and those issued by the State to raise the capital of the Bank of Tennessee, or to build her State-house; nor was there any difference in price between the bonds loaned to the most valuable railroads and those loaned to the most worthless, except that in both of the above cases a difference of from two to five per cent. on limited transactions has arisen within the last two years in the open market in New York, but no difference has ever existed on the Stock Exchange of New York, owing to the way in which Tennessee bonds are called at said Exchange. (See L. & N. Trans. p. 1029 to 1032).

To illustrate: The Louisville & Nashville Railroad Company has at all times been prompt in the payment of the interest and principal of its bonded indebtedness, and its road has been regarded as as one of the best in that section of the country. The Edgefield & Kentucky Railroad Company defaulted on its interest, and its road was placed in the hands of a Receiver before the war, and after the war its road was sold to enforce the lien retained by the State in the Acts of 1852. Both of said companies borrowed bonds from the State of Tennessee under said acts, and yet the bonds loaned to the Louisville & Nashville Railroad Company did not command any higher price than those loaned to the Edgefield & Kentucky Railroad Company; nor did the bonds loaned to the Louisville & Nashville Railroad Company command any higher price than the straight, unsecured bonds of the State of Tennessee.

These facts show conclusively, that the capitalists of 1852 purchased the bonds loaned, upon the faith and credit of the State alone, and that they did not understand that the railroad companies were personally responsible to them upon the bonds in any way; nor did they understand that there was any lien in their favor upon the railroads of Tennessee.

This practical construction, placed upon the Acts of 1852 by the capitalists of that day, has been concurred in by every one who dealt in Tennessee bonds from 1852 down to the present time, and we submit, with all confidence, that it is entitled to great weight in the consideration of the questions involved in these causes.

VI.

There were three statutes passed at the Session of 1851–2 authorizing the loan of State bonds to railroad companies:

First. An act passed January 15, 1852, authorizing the loan of bonds to the East Tennessee & Virginia Railroad Company, to aid in building its bridges. (L. & N. Trans. p. 1736).

Second. An Act passed February 4, 1852, authorizing the loan of bonds to the East Tennessee & Georgia Railroad Company to aid in building a bridge upon that road. (L. & N. Trans., p. 1793).

Third. The general Act passed February 11, 1852, authorizing the loan of bonds to a number of railroad companies mentioned therein. (See L. & N. Trans., 1797).

It is evident that the Legislature at first intended to confine the loan of bonds to the East Tennessee & Virginia and the East Tennessee and Georgia Railroad Companies, and to restrict the use of the bonds to the construction of the bridges upon those two roads, which were then somewhat advanced in their construction; but, having authorized the loan of bonds to those two companies, the Legislature afterwards concluded to enlarge the loans so as to aid various other railroad companies, and to aid not only in the construction of bridges, but in the superstructure and equipment of the roads, and it was in execution of this purpose that the Act of Feb. 11, 1852, was passed, to establish a general system of internal improvements.

Of course, all three of said Acts must be construed *in pari materia*, and each of them will aid somewhat in the construction of the others.

There is one remark which is applicable to all three of them, and that is, that though the State is said to loan its bonds to the railroad companies to aid them in the construction of their roads and bridges, yet the loans were not made as a matter of kindness to the railroad companies. Doubtless the statutes were passed at the instance of the railroad companies, but they did not ask the loan of the State's bonds as a gratuity, nor would the State have made the loan as a mere favor to the companies; on the contrary, the State of Tennessee expected to receive, and has, in fact, received a full equivalent in the increased value of her taxable property, for all

the bonds that she loaned to the railroad companies under those statutes.

Gov. Neil S. Brown, in his message of Oct. 5, 1849, speaking of the geographical position of Tennessee and her urgent need of railroad facilities, uses this language: "I need not employ arguments or facts to enforce the incalculable benefits of such a line of railroad to the people of Tennessee. Remote from the ocean and lakes, and limited, to a great extent excluded, from water communication, this State, with all its vast resources, has been kept in the rear of improvements which now mark the age. Our growth in numbers and wealth, though considerable, has been slow compared to our capabilities." (L. & N. Trans., 1721).

Gov. Trousdale, in his message of October 22, 1849, says: "Upon looking at the geographical position of our State, the mind is strongly impressed with the necessity of a railroad communication extending from the eastern to the western boundary, as nearly through its center as practicable. Such an improvement would place every portion of the State within an accessible distance of the line of road, and would give a universal impulse to industry and enterprise, which could not fail, in a short time, to make ours one of the richest States of the Union." (L. & N. Trans., 1725).

Gov. Campbell, in his message of October 9, 1851, to that session of the Legislature at which the Acts now in controversy were passed, uses this language: "No State has more to promise itself from a well regulated system of internal improvement than Tennessee. Geographically placed in a vast interior, far distant from ocean and lakes, and the great marts of commerce, the heavy products of our labor slowly wend their way to distant markets, burdened with great costs, risks and delays of transportation, while the fabrics of other countries reach us in return, taxed with the profits of a hundred hands through which they must pass before they touch our borders." And after pressing upon the Legislature the importance of establishing a system of railroads, he says: "It will require many years, and large expenditures to accomplish it; but when done it will return the expenditures tenfold, fully develop our vast resources, and ultimately render Tennessee one of the most prosperous and powerful States in the Confederacy." (L. & N. Trans., 1734–37).

The question has been raised in argument, as to whether, in the transactions growing out of the legislation of 1852, the State of Tennessee acted in her sovereign capacity as a State, or laid aside her sovereignty, and descended to the level of the individuals with whom she dealt. Surely if a private individual, owning a large landed property, but distant from the market, should agree to loan his negotiable notes to a company, on condition that such company would build a road, the effect of which would be to greatly enhance the value of his property, he would not be regarded as having acted from motives of mere kindness or generosity; and, so, if a Sovereign or State is possessed of a vast domain which requires for its proper development important and extensive railway facilities, and such State agrees to loan its negotiable bonds to certain companies upon condition that those companies will construct certain designated roads, the State ought not to be regarded as acting from motives of generosity, but as being actuated by the desire to subserve her own material interests.

Appellant's counsel have persistently attempted to place the State in the attitude of a disinterested friend of the railroad companies, a friend who had no personal or selfish motives to subserve, and whose sole object was to assist the railroad companies in their pecuniary difficulties. The use which counsel seek to make of that position, is, to place the State in the attitude of a mere accommodation endorser, and the companies in the attitude of principal debtors, who have received all the benefits that have arisen from the transactions out of which this controversy has grown.

My contention, however, is that the State occupied no such position as surety or endorser for the companies; that the State and the companies were both contracting parties, standing upon equal ground, dealing at arm's length, and seeking to advance their respective pecuniary interests; that each party is entitled to a fair construction of the contract, but that the State is not entitled to the judicial sympathy which is usually extended to an injured surety.

A glance at the terms imposed by the State, as a condition upon which it would loan its bonds to the railroad companies, is sufficient to establish the correctness of my contention upon this point. The first section of the Act of 1851–2 required that before any bonds were issued by the State, the individual stockholders

should subscribe enough money to grade, bridge, and prepare for the rails, the whole extent of the main trunk line proposed to be constructed by the company, and furthermore, that the company should have graded, bridged and fully prepared, ready for the rails, a section of thirty miles at either terminus; and upon that appearing, the State agreed to loan the company, bonds to the amount of $8,000 per mile. (L. & N. Trans., p. 1796).

According to the estimate of railroad engineers, to grade, bridge and prepare a railroad, ready for the rails, will require about three-fourths of the total cost of the road; so that in brief, the proposition of the State was, that if the individual stockholders would raise money enough to pay three-fourths of the cost of the road, the State would loan the company, bonds enough to pay the remaining one-fourth; but before the State would loan even that amount, she required that a section of at least thirty miles should have been prepared ready for the iron.

By the eleventh section of said Act, the State required that all the railroads should adopt a uniform guage; and by the sixteenth section the State required that they should receive full loaded freight cars from each other, and transport the same to their destination, and return them, without charging any greater rate of freight than they charged for similar freight in their own cars. The State thus secured not only a full graded section of thirty miles from each company, but it secured an extensive system of railroads, with close connections, and a thorough interchange of freights.

By the second section the State required that the bonds loaned should not be used for any purposes other than for procuring the iron rails, chairs, spikes and equipments, and for putting down the rails; and the State was to have the right to appoint a commissioner to see to the negotiation of the bonds and the application of their proceeds.

By the eighth section the State required the company to make semi-annual reports, showing its financial condition and its business operations; and by the seventeenth section the State, though not a stockholder, insisted upon being allowed two directors in each company, to protect the interests of the State. By the third and fourth sections the State reserved a first lien not only upon the road, property, and franchises of the company, but also upon the stock of the individual stockholders, to secure the repayment to the State of the bonds loaned to the company.

By the fifth section, the State required the company to deposit, or pay into the Bank of Tennessee, fifteen days before the interest fell due to the bondholders, an amount sufficient to pay said interest, with exchange and commissions, and upon failure to do so, the State was to have the right to appoint a receiver to take charge of, and operate the road.

By the seventh section, the State required the company, five years after the completion of the road, to commence a system of partial payments, upon a scale that would repay to the State nearly all of the bonds loaned to the company, by the time the bonds fell due to the holders; and upon failure to make such partial payments, the State was to have the right to place the road in the hands of its receiver. By the sixth section, if the company failed to pay any of the bonds when they fell due, the State was to have the right to sell the road under legal proceedings; and under the fourteenth section, the State was to have the right to purchase the road at such sale, and to hold it as its own property.

It is difficult to imagine a more rigorous contract than the State exacted from the railroad companies for the loan of its bonds. I see no evidence of the disinterested friendship of the State. I see no element upon which the State can predicate a claim to the meritorious position of a surety. She stands forth as a party seeking to advance her own interests, to increase the value of her own property. She is not willing to contribute one cent. She requires the repayment to her of every dollar that she loans, and she undertakes to secure it by a sweeping lien upon every thing that the company owns. She provides for the enforcement of that lien by the most summary and effective remedies then known to jurisprudence; and then, by the twelfth section of the Act, she reserves the right to pass all such other and further laws as she might deem necessary to protect her own interests, without the slightest regard to any other interest, except the vested interest of the stockholders.

If the Act of February 11, 1852, had never been amended, and its provisions had been faithfully observed by the officers of the State charged with its administration, it would have been impossible for the State of Tennessee ever to have lost a dollar by the loans authorized in it. In after years the amount of loans were increased, and in some instances the bonds were issued without requiring a performance of the conditions imposed; but notwithstanding all of

the ill advised legislation that followed years after its passage, and notwithstanding the maladministration of its provisions, the State of Tennessee has been repaid nearly twenty millions of the bonds which she loaned to the companies; and if she had never been repaid a cent, the increase in the taxable value of her property would more than compensate her for the entire amount advanced by her to the companies. The assessed value of her taxable property was increased from $177,420,305 in 1852, to $385,936,794 in 1860. (L. & N. Trans., pp. 1017, 1018).

The State made a good contract for herself, and the capitalists of that day so regarded it; they felt satisfied that the State had amply protected itself in all of the loans that it proposed to make, and that it would be able to collect from the companies all that they had promised to pay, and therefore that investors would risk but little in purchasing the bonds of a State that displayed so much caution in making its loans.

VII.

Most of the bonds loaned by the State under the Acts of 1852, were loaned to enable the railroad companies to iron and equip their roads, and are known as "road bonds." The others were loaned to pay for bridges, and are known as "bridge bonds." The "road bonds" were issued under the Act of February 11, 1852, and its amendments.

The "bridge bonds" were issued under the Act of February 4, 1852, and its amendments.

The Act of February 11, 1852, provided that the amount of "road bonds" loaned should not exceed $8,000 per mile; that no bonds should be issued until one section of thirty miles was graded, bridged, and fully prepared for the iron rails; and after issuing bonds for that section, no other "road bonds" should issue until another section of twenty miles was graded, bridged and prepared ready for the rails. (L. & N. Trans., pp. 1796, 1798).

By requiring sections of such length to be fully graded and bridged before the bonds were issued, the lien would rest upon roads which were long enough to be of value and importance; by requiring the bonds loaned to be used exclusively in ironing and equipping sections, their full completion was assured; and by restricting the amount of bonds to $8,000 per mile, the completed sections would furnish adequate security for the loans.

The Act of Febauary 4, 1854, provided that the "bridge bonds" should not be issued until good and substantial bridges had been constructed and finished complete, and then, only so many bonds were to be issued, as would be necessary to pay for the construction of the bridge. (L. & N. Trans., p. 1793–4).

By an Act passeed February 17, 1854, the law was changed so as allow the companies to obtain "road bonds" upon sections of ten miles, instead of twenty miles, after the first section of thirty miles had been completed. (L. & N. Trans., p. 1851). And by an Act passed January 19, 1856, the law was changed, so that instead of requiring the sections to be graded, bridged, and fully prepared for the iron rails the companies were allowed to receive "road bonds," by simply showing that the sections were graded. (L. & N. Trans., p. 1857).

By an Act passed Feb. 8, 1854, the amount of "road bonds" to be loaned was increased from $8,000 to $10,000 per mile. (L. & N. Trans., p. 1846).

By an Act passed Feb. 26, 1852, instead of requiring the bridges to be finished complete before the "bridge bonds" were issued, the companies were allowed to draw them in installments as the work upon the bridges progressed. (L. & N. Trans., p. 1845).

It will be seen that by virtue of these statutes, the State of Tennessee, while it increased the amount of the loans twenty-five per cent, reduced the length of the sections fifty per cent.

It is evident that these changes in the law seriously affected the value of the lien. If that lien belonged to the bondholders they certainly had the right to protest against its impairment, and it is not pretended by our opponents that any such protest was ever made. If, however, as we contend, the lien belonged exclusively to the State, then it was a matter of no importance to the bondholders whether its value was increased or diminished; the fact that the bondholders stood by and allowed the State without protest to seriously impair the value of the lien, is a practical construction of the law by them, to the effect that they had no interest whatever in the lien.

VIII.

The bonds that were to be loaned to aid in the construction of the roads and bridges were to be precisely alike, and were to be the coupon bonds of the State of Tennessee, bearing an interest of six

per cent. per annum, payable semi annually, and they were to have not less than thirty, nor more than forty years to mature. (See L. & N. Trans., p. 1797, 1793, 1794).

The Governor was directed to have them engraved. They were all to be dated on the first day of January, prior to their issuance, and the coupons upon all of them were to be payable on the first days of January and July of each year. (See Act of Feb. 21, 1852, L. & N. Trans., p. 1843).

The form of the bonds was as follows:

M. UNITED STATES OF AMERICA. M.

No. 6532. B.

STATE OF TENNESSEE.

Know all men by these presents, that the State of Tennessee acknowledges to owe to ————————, or order, one thousand dollars, lawful money of the United States, which sum the said State promises to pay in the city of New York on the 1st day of January, 1892, with interest at the rate of six per cent. per annum, payable semi-annually, according to the tenor, and upon the presentation of the coupons hereto attached, for the performance of all which the faith of the State of Tennessee is hereby irrevocably pledged, as this bond is issued in pursuance and under the provisions of an Act of the General Assembly of said State, passed at its session of 1851–2.

In witness whereof I, Isham G. Harris, Governor of said State, have hereunto signed my name and caused the same to be countersigned by the Secretary of said State, and the Great Seal of said State to be hereto affixed at Nashville this, 1st day of January, 1858.

——
| L. S. |
——

ISHAM G. HARRIS, *Governor.*

WM. N. MCBURTON, *Secretary of State.*

$1,000. $1,000.

(See L. & N. Trans., p. 200).

The form of the coupons was follows:

$30. $30.

The Treasurer of the State of Tennessee will pay the bearer thirty dollars in the city of New York on the first day of January, 1876, being the semi-annual interest then falling due on bond No. 6,532.

$30. $30.

J. T. DUNLAP, *Comptroller.*

(See L. & N. Trans., p. 202).

By reference to the bonds proved by Appellant Stevens in these causes it will be seen that there is not the slightest difference, except in their numbers, between the bonds loaned to the L. & N. R. R. Company, and the bonds loaned to the Tennessee & Alabama Railroad Company, and the bonds loaned to the Central Southern Railroad Company. (See L. & N. Trans., 200–4–6).

Neither of said companies are named in any of said bonds, and it will be noticed that they do not even specify the Act of the Legislature under which they were issued, the only reference upon that point being as follows: "This bond is issued in pursuance and under the provisions of *an* Act of the General Assembly of said State, passed at its session of 1851–2."

It so happens that there were five separate acts passed at the session of 1851–2, under which six per cent. State bonds were authorized to be issued, viz.: The Act of January 15, 1852, authorizing the issuance of bonds to the East Tennessee & Virginia Railroad Company (L. & N. Trans., p. 1739); the Act of February 4, 1852, authorizing the issuance of bonds to the East Tennessee & Georgia Railroad Company (L. & N. Trans., p. 1793); the Act of February 11, 1852, authorizing the issuance of bonds to a number of railroad companies named therein (L. & N. Trans., p. 1796); the Act of February 5, 1852, authorizing the issuance of bonds to the Dyersburg & Mississippi Turnpike Company (Acts of 1851–2, p. 147); and the Act of February 21, 1852, to authorize the renewal of certain bonds. (L. & N. Trans., p. 1120).

It will be seen by reference to the form of bond above given, that there was nothing upon the face of it to show under which of the five above-named acts it was issued.

It is stipulated by counsel in these causes, "that the name of the railroad company to which the bonds were loaned, does not in any way appear therein, or upon the bonds; that the bonds were principally negotiated or transferred either in Tennessee or New York; that they were either payable to bearer, using those words, or to ——— or order, leaving the blank unfilled, or if filled, it was done with some name, other than the name of the companies to whom they were loaned." (L. & N. Trans., p. 1030). The only way in which it would have been possible for a purchaser to have known to what company a particular bond had been loaned, would have been to have examined the receipts given to the Secretary of State

for the bonds by the companies, at the time they were issued; those receipts were kept by the Secretary of State in a book in his office; at Nashville; and the information contained in the receipts taken by him from the companies as to bonds loaned before the late war was never made known to the public until a report was published by John C. Burch, Comptroller of Tennessee, in 1875; and the information relative to the bonds loaned after the war was not made public until a report was published by G. W. Blackburn, Comptroller, in 1869. It is proper in this connection to state, that a legislative committee did make a report to the Legislature of Tennessee at its session of 1857–8, in which the numbers of the bonds issued to the railroad companies previous to that date were given; but there is no evidence that any copy of that report ever reached New York, where most of the bonds were negotiated; and it is stipulated by counsel that as a matter of fact, the purchasers of the bonds did not know when they purchased the same originally, to what companies they had been issued. (L. & N. Trans., p. 1029).

It is well known that when railroad bonds are offered for sale, they invariably show upon their face the name of the company by whom they are executed; and when they are mortgage bonds, they state briefly but clearly, the railroad and other property covered by the mortgage; and the regularity of their issue is generally certified in or upon them by the trustees in the mortgage, one or more of whom are usually selected from New York, or from the place where it is expected to negotiate the bonds.

The fact that the Governors, Secretaries of State, and Comptrollers, who issued the bonds of the State, made no recital in any of them, to show to what companies they were issued, or upon what roads they were to be liens, is a practical construction by the Executive Department of the State of Tennessee, to the effect that such recital was unnecessary, inasmuch as the bonds were not to be liens in favor of the purchasers; and the fact that the parties who purchased the bonds, made no inquiry as to whether they were issued to railroad companies or not, is a practical construction by those parties, to the effect that none of the bonds issued by the State under the acts passed at the session of 1851–2, were liens upon the railroads of the State.

IX.

As appellant's main reliance is placed upon a single expression to be found in the third and fourth sections of the Act of February 11, 1852, I propose now to examine that expression. The third section provides "that so soon as the bonds of the State *shall have been issued* for the first section of the road as aforesaid, *they shall constitute* a lien upon said section, * * * and the State of Tennessee, *upon the issuance* of said bonds, and by virtue of the same, shall be vested with said lien or mortgage, without a deed from the company, for the payment by said company of said bonds, with the interest thereon, as the same become due." (L. & N. Trans., pp. 1797–1798).

The fourth section provides that "when the whole of said road shall be completed, the State of Tennessee shall be vested with a lien, without a deed from the company, upon the entire road . . . for the payment of all of said bonds issued to the company *as provided in this act*, and for the interest accruing on said bonds." (L. & N. Trans. p. 1799).

All agree that the lien was vested in the State of Tennessee, but we contend that the lien was vested in the State for her own use, and not for the benefit of the bondholders; while our opponents contend that the lien was vested in the State as a mere trustee for the bondholders.

All agree that the lien was vested in the State to secure the payment by the company of the bonds, with interest thereon, as the same become due, but we contend that the payment of the bonds and interest was to be made to the State, "*as provided in the act*"; while our opponents contend that the payment was to be made to the bondholders.

In the first place, our opponents are forced to concede that there is no express provision in the statute that the payment is to be made to the bondholders; in fact, they are forced to concede that the bondholders are nowhere mentioned in the act. Their whole argument is, that as the company is to pay the bonds, it must necessarily follow that the payment must be made to the persons who hold the bonds. We concede that if the statute provided no other payment than payment of the bonds, it would naturally follow that the payment meant would be payment to the bondholders. It would, however, be a mere implication, and not an express contract to that

effect. We say, however, that the statute contains an express provision as to the mode of payment, not only of the interest, but of the principal of the bonds, and that the payment so provided by the act, is payment, not to the bondholders, but to the State. We say that the rights and liabilities of the parties must be governed exclusively by the statute. The companies were no parties to the bonds; they were not named in them, nor were they in any way referred to in them. Whatever may be their liability, it must necessarily be imposed by the statute alone. We find that while the statute does impose upon the companies the payment of the bonds, it at the same time directs that the payment shall be made to the State; and as but one payment of the bonds is contemplated by the statute, when that payment is made to the State, the obligation of the companies in that regard is at an end. When the State made a loan of its bonds to a company under the statute, a debt arose from the company to the State, immediately upon the issuance of the bonds to the company; the company became immediately bound to pay the State for those bonds; and the State, "upon the issuance of the bonds, and by virtue of the same," became vested with a lien for said payments. Although the bonds may have remained in the hands of the company for a year, or for ten years, the debt from the company to the State for the bonds, would have existed in as full force, as if the company had sold the bonds the day after it received them; and the lien which took effect upon the issuance of the bonds to the company, would have continued, and been operative in favor of the State, no matter how long the company may have retained the bonds in its possession.

In illustration of this view, the Tennessee & Alabama Railroad Company received from the State three hundred bonds in July and September, 1854. The English merchants who sold them their iron, failing to deliver it according to contract, the company refused to pay them, and reserved one hundred and forty-three of the bonds until the dispute could be settled; and those bonds continued in the company's possession until after August, 1855. The same company retained in its possession three hundred and one State bonds from June 4, 1858, to June 30, 1859; and it retained two hundred and one bonds in its possession from June 4, 1858, to June 30, 1860, a period of over two years. (L. & N. Trans. p. 1031). The interest which matured on those bonds, while retained in the possession of

the company, was paid, by clipping off their coupons and returning them to the State. (L. & N. Trans., p. 790).

Now it is quite clear that a lien existed in favor of the State upon the Tennessee & Alabama Railroad from the moment those bonds were issued to that company; it is also quite clear that while the bonds remained in the possession of the company, the lien existed alone in favor of the State; and it is equally clear that the lien so existing was to secure the payment of the principal and interest of those bonds to the State. If the lien existed in favor of the State against that company, for the two years during which the company held those bonds, where is the language in the statute which deprived the State of that lien, and transferred it to the bondholders, when they purchased the bonds, two years after the State's lien had attached? And if, during the two years that the bonds were retained by the company, the company was bound to pay the interest upon them to the State, by what language in the statute was that obligation transferred from the State to the purchasers of the bonds? If the bonds had been executed by the company, and had been payable to the State, and had been secured by a lien in favor of the State, then, upon the transfer of the bonds by the State to a purchaser, the lien would have passed with the bonds from the State to the purchaser. But the bonds were not executed by the company; they were the negotiable bonds of the State itself; they were not transferred by the State to the purchaser, and therefore the lien which belonged to the State could not have passed to the purchaser.

Suppose a party should borrow a thousand dollars, in national bank-notes, from a national bank, and should give the bank a lien upon his property to secure the repayment of said notes twelve months after date; suppose he should use the notes thus borrowed by him in the purchase of a stock of goods; suppose that he afterwards repaid to the bank the amount borrowed; suppose, further, that the notes, by reason of their being lettered and numbered, could be easily traced, and upon the insolvency of the bank, the holder of the notes should attempt to enforce the lien which the bank had reserved upon the property of the borrower, would such a claim be entertained for a moment? and if not, wherein does that case differ from this? The bonds of the State were negotiable instruments, intended to be placed upon the market to be sold from hand to hand, and to be passed almost as bank-notes. In the case

at bar, as in the case supposed, there was a loan of negotiable instruments; there was a lien given by the borrower to the lender to secure the repayment of the loan; in both cases the negotiable instruments were sold or negotiated by the borrower, and the persons to whom they were sold or negotiated acquired nothing but a right to resort to the makers of the instruments for payment.

When the State made a loan of its bonds to a company, the company, as borrower, became indebted to the State, as lender, for the amount of the bonds thus loaned; in other words, it created a debt from the company to the State for the amount of the bonds, and the lien was given to the State, to secure that debt from the company to the State. When the bonds were issued to the company by the State, they became the property of the company, as much so as if they had been bonds issued by some other State, or by the United States. When the company sold the bonds, inasmuch as it did not endorse or guarantee them in any way, the relation that existed between the company and the purchaser was simply that of vendor and vendee; the company did not agree with the purchaser, either expressly or by implication, to become liable to him, for the payment of the bonds to him by the State. They were sold as negotiable instruments, in open market, at their market price, without any warranty or guaranty, except as to their genuineness and ownership. (See Otis *v.* Cullum, 92 U. S., 447).

It is a gross mistake to say that the company borrowed money from the bondholder, upon the accommodation paper of the State. Instead of discounting the bonds of the State, or hypothecating them as collateral security, for a loan, the company made an absolute sale, with no warranty other than as I have just stated.

It is true, that when the bonds were sold by the company, a debt was created from the State to the purchaser, but the purchaser obtained no security for the payment of that debt except the faith and credit of the State.

The capital error into which our opponents have fallen, is in supposing that the lien given by the State, was to secure the debt from the State to the purchaser of the bonds, when in truth it was given to secure the debt from the company to the State for the loan of the bonds; in supposing that the State stood in the relation of a surety to the company, when in fact it stood in the relation of a creditor; in supposing that the company stood in the relation of a

maker of the bonds, when in fact it was only the vendor of bonds made by the State; and in supposing that the company was a borrower from the bondholder, when in reality it was a vendor of bonds to him.

The moment we see that the bonds were not the accommodation paper of the State, and that the company did not borrow any money from the bondholder, we get rid of the idea that the State stands as a surety for the companies, and the whole doctrine of subrogation is laid out of the case.

It will be remembered that the fourth section of the Act of February 11, 1852, provides that when the road shall be completed, the State shall be vested with a lien "for the payment of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds." (L. & N. Trans. p. 1799).

Our opponents contend that the phrase "as provided in this act" refers to the word "issued," and that the meaning of the clause is that the lien shall be for the payment of the bonds "*issued* as provided in the act." We contend that the phrase refers to the word "payment," and that the meaning of the clause is, that the lien shall be "for the *payment* of the bonds as provided in the act."

We think our construction of the clause is correct, for the following reasons:

1st. The clause occurs in the fourth section, and the *issuance* of the bonds had already been provided for in the previous sections, with great minuteness of detail. There was, therefore, no need to make any provision whatever in the fourth section in regard to their *issuance*; but no provision had been made in the statute, prior to the fourth section, in regard to the mode of *payment*, and therefore it was proper that the fourth section should explain how the payment was to be made; and this it does, by saying that the payment shall be made "as provided in the act" itself.

2d. In the sixteenth section of the same act, in speaking of the lien on the Memphis & Charleston Railroad, and branches, this language is used: "And the lien of the State, as herein secured, shall continue upon said main line, and also upon said branches, until said bonds are *paid, as heretofore provided.*" (L. & N. Trans p. 1808).

The mode of paying the interest had been provided in the fifth section, and the mode of paying the principal had been provided in

the seventh section, and therefore in the sixteenth section, the expression is used, "paid as heretofore provided," meaning as provided in the fifth and seventh sections of the act.

It will be noticed that the word "issued" does not occur in the clause which is quoted from the sixteenth section, and that the phrase, "as heretofore provided," used in said clause, necessarily refers to the word "paid," and that the obvious and only meaning of that clause is, that the lien upon the Memphis & Charleston Railroad shall be for the payment of the bonds, "as provided in the act." So, in the fifth section, the Comptroller is directed to issue his warrant, for any sum of money, necessary to meet the interest, "on such bonds as may not be provided for by the company, *as provided for in this act.*" (L. & N. Trans., 1800).

As the same expression occurs in three different sections, and in two of them its meaning is perfectly clear, we are bound to assume that it was used in the same sense in the other section, if, in such other section, its meaning is at all obscure.

3d. There was no need to say that the lien was for the payment of the bonds "*issued* as provided in the act," for that was already clear beyond the possibility of a doubt. There was no pretense whatever, that the lien was to secure any bonds except those issued under that act; and to make an express provision to that effect would have been utterly useless.

We contend, however, that if the words, as "provided in this act," had not been used in the statute at all, the result would have been precisely the same. Inasmuch as there is nothing upon the face of the bonds obligating the company to pay them, and inasmuch as the statute contains the only obligation of the company to pay them, the payment must necessarily be such as is provided by the statute.

Our opponents seem to think that because the Act of February 11, 1852, expressly provides that the lien shall be to secure "the payment by said company of said bonds, with the interest thereon, as the same becomes due," it necessarily means to secure the payment by the company to the bondholders, and that no other mode of payment is legitimate in the face of that provision. A reference, however, to the statutes of Tennessee, and of other States, will show that similar forms of expression, as strong, if not stronger, than the provision just quoted, have been construed contrary to the contention of our opponents.

I have already called attention to the Act of Tennessee, passed February 19, 1836, in which it was provided that the internal improvement companies, to whose capital stock the State subscribed, and which subscriptions were to be paid for in State bonds, should "agree and stipulate to pay the interest semi-annually, as the same shall accrue and be payable." (L. & N. Trans. p. 1614). And yet it will be conceded by our opponents that said companies were not expected to pay, and did not, in fact pay, the interest on those bonds to the bondholders; their payments were made to the State, and the State paid its interest to the bondholders.

I have also called attention to the Act passed January 19, 1838, which authorized the Governor to call upon the internal improvement companies, for such amounts as might be required of each company, to be paid in order to meet the interest on the bonds of the State. (L. & N. Trans., p. 1631).

Our opponents will concede, that notwithstanding the language just quoted, the companies referred to were not expected to pay, and in fact did not pay, the interest upon those bonds to the bondholders; on the contrary, the act itself provided, that the interest should be paid to the bondholders by the Bank of Tennessee. In other words, though the provision, at first glance, would seem to require the companies "to meet the interest on the bonds of the State" by paying it to the bondholders, yet, other provisions of the same act rendered it perfectly clear, that they were to meet it, by paying to the State an amount that would enable the State to pay the interest to the bondholders. An Act passed February 4, 1852, to aid in the completion of the East Tennessee & Georgia Railroad, authorized the loan of State bonds to that company, and provided in its third section that the State should hold the entire road and bridges, and all the tolls, &c., "for the security of the payment of said bonds and the interest thereon accruing, as a mortgage to secure the payment of the same;" and yet, notwithstanding the strong language of that provision, the second section of the act directed, that "for the purpose of enabling the company to raise a fund for the payment of the interest on said bonds, and also to pay the principal thereof, at or before maturity," the company should be authorized and required to charge a certain amount of bridge toll, in addition to regular passenger money, and should pay over said bridge toll into some bank at Knoxville, taking the receipt of

the bank therefor, and the "sum so deposited in bank shall at all times be subject to the check of the Comptroller of the Treasury," for the payment of the interest on said bonds—any overplus, after the payment of said interest, shall be passed to the credit of the company in discharge of the principal due on any one or more of said bonds, provided, that as soon as the interest and principal of said bonds shall be paid, the said company shall be released from the exaction of said additional charge." (L. & N. Trans., pp. 1795–1796).

In other words, though the third section directs that the mortgage shall be to secure the payment of said bonds and the interest thereon accruing, yet, when we look to the second section of the same act, we see that said payment is to be made by collecting certain bridge tolls, and depositing them in bank, to the credit of the State Comptroller, until they shall amount to enough to pay the interest and principal of the bonds, and that the manifest intention of the act is, that the interest shall be paid to the bondholders, not by the company, but by the State.

An Act passed February 5, 1852, authorizing the loan of bonds to the Dyersburg & Mississippi River Turnpike and Plank Road Company, provides, in the fourth section, that the State shall have a mortgage upon the road and other property of the company, "as security for the payment of the above named bonds of the State;" and yet, the sixth section of said act directs, "that said company shall pay the interest on said bonds semi-annually, on the first day of January and July in each and every year, into the Treasury of the State of Tennessee." (Acts of 1851–2, p. 148).

In other words, the express provision of the fourth section securing the payment of the bonds by the company, which, of course, carried with it the payment of the interest, is controlled by the provision of the sixth section, which, instead of requiring the company to pay the interest to the bondholders, required it to be paid into the Treasury of the State.

It will be noticed that both of the acts last cited were passed at the same session, at which the Act of February 11, 1852, was passed; and even the last-mentioned act, itself furnishes an illustration, similar to those I have just given. The thirteenth section of said act provides, that if any railroad company should fraudulently or illegally obtain any of the bonds of the State, a suit should be

instituted in the name of the State, and the court should order and decree that the road, with all the property and assets of the company, or a sufficiency thereof, should be sold, and the proceeds paid into the Treasury, and said company should forfeit all rights and privileges under the provisions of the act. The section concludes with this language: "And the stockholders thereof shall be individually liable *for the payment of the bonds* so fraudulently obtained by such company, and for all other losses that may fall upon the State, in consequence of the commission of any other fraud by such company, excepting such stockholders as may show to the said court that they were ignorant of, or opposed the perpetration of such frauds by the company." (L. & N. Trans., p. 1805). Evidently the proceedings contemplated by the thirteenth section, would naturally take place within a few years after the bonds were fraudulently or illegally obtained; it is not at all probable that such fraud or illegality would remain undiscovered for thirty or forty years, the period of the maturity of the bonds. Now, it is unreasonable to suppose, that the section intended that the court, twenty or thirty years in advance of the maturity of the bonds, should render a decree to the effect, that the individual stockholders should pay the bonds to the bondholders when they matured. The section contemplated that the road should be sold; that the company should forfeit all of its rights and privileges under the act; and that a decree should be made in the name, and in favor of the State, against the guilty stockholders, for the amount of the bonds wrongfully obtained by the company, which decree should be paid into the Treasury of the State; and that the State should pay the bonds to the bondholders, when they matured. In other words, though the section does say that the guilty stockholders shall be liable "for the payment of the bonds," yet it evidently means that they shall pay the bonds to the State, or an amount, equal to the amount of the bonds.

The State of Maryland issued its sterling bonds, or certificates of stock, to the Baltimore and & Ohio Railroad Company, under a statute which provided "that the said company shall secure by mortgage, on all the property and revenues of said company, to the satisfaction of the Treasurer, the payment of the interest at the rate of five per cent. per annum on the stock created by this Act, semi-annually, at least ninety days before the first day of January and July in every year, for the term of thirty years from the date of the bonds, together with the cost of transmitting said interest to Lon-

don, to be there paid, and also, the difference in the exchange of currency between London and the city of Baltimore."

In construing that statute, Mr. Justice Strong, speaking for this court, said: "This was a stipulation for indemnity; it covered all that the State was required to pay as interest on her sterling bonds." (Maryland *v.* Railroad Company, 22 Wall., pp. 107, 115).

It is true that the question, now before the court, was not involved in that case; but it is clear, that if the mortgage in that case was intended as a mere indemnity to the State, and its only object was to cover whatever the State was required to pay to the bondholders, it could not have been intended that the company should pay the interest directly to the bondholders; the fact that the company was to pay the interest ninety days before it was due from the State upon the bonds, was conclusive that the company was not to pay the interest to the holders of the bonds; and though the company was to pay the interest, yet, it was to pay it to the State, with commissions and exchange on London, so as to enable the State to pay the interest to its bondholders.

The State of Missouri issued its bonds to certain railroad companies, and imposed upon the roads a statutory mortgage "for securing the payment of the principal and interest of the sums of money, for which such bonds shall, from time to time, be issued and accepted as aforesaid;" and the ninth section of the Act provided that "each of said companies shall make provision for the punctual redemption of the said bonds so issued, as aforesaid, to them respectively, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the Treasury of this State from any advance of money for that purpose." (L. & N. Trans., pp. 2055, 2056, 2057).

Notwithstanding the positive language just quoted, it was the opinion of Judge Dillon, and also of the Supreme Court of Missouri, that the State had the right to sell the road, and to become the purchaser thereof; and upon such purchase by the State, under the lien reserved in the statute, the lien was extinguished and the State alone remained liable to the bondholders. (2nd Dillon, p. 207, Murdock *v.* Woodson; 37 Mo., p. 134, Advisory opinion by Supreme Court).

The amended Constitution of Minnesota authorized the loan of bonds of that State, to certain railroad companies, but, upon the con-

dition that "each company shall make provisions *for the punctual payment and redemption of all bonds issued and delivered as aforesaid to said company, and for the punctual payment of the interest* which shall accrue thereon, in such manner as shall exonerate the Treasury of the State from any advances of money for that purpose; and as security therefor the Governor shall demand and receive from each of said companies, before any of said bonds are issued, an instrument pledging the net profits of its road *for the payment of said interest,*" etc. (L. & N. Trans., pp. 2101, 2102). And the mortgage executed in pursuance of said constitutional provision contained this clause: "That in case of the prompt payment by said party of the first part, of the principal and interest of the State bonds, to be issued by the party of the second part, * * * then, in that case, this instrument shall be and become wholly null and void," etc. (L. & N. Trans., p. 2110).

Notwithstanding the express stipulation that each company should make provision for the punctual payment of the bonds and interest, it was held by this court in the case of Chamberlain *v.* S. P. & S. C. R. R. Co., 92 U. S., p. 299, that the bondholders had no equity for the application of the land covered by the mortgage to the payment of the bonds. A consideration of the general scope of the statute satisfied the court that the contract of the companies to pay the bonds and interest, was a contract with the State alone, to the benefits of which, the bondholders were not entitled.

It is true that our opponents attempt to distinguish between the payment of a sum of money for which a bond is issued, and the payment of the bond itself; but whenever you pay the amount for which a bond was issued, the bond itself is paid. They also attempt to distinguish between the punctual payment of the interest upon a bond, and its punctual payment, "so as to exonerate the State from any advances of money for that purpose;" but I confess I cannot see how it would be possible to exonerate the State from any advances for interest except by punctually paying, or providing the State with the interest, so as to render it unnecessary for the State to make any advances for that purpose.

Under an Act of Congress, approved July 1, 1862, the Government of the United States loaned certain bonds and made certain grants to the Union Pacific Railway Company. The sixth section contains this clause: "That the grants aforesaid are made upon

condition *that said company shall pay said bonds at maturity*, and shall keep said railroad and telegraph line in repair," etc., etc. (L. & N. Trans., 2125). And yet, notwithstanding that express condition, this Court, looking to the general scope and tenor of the Act, allowed the condition to be controlled by other provisions in the statute, which made it manifest that it was not the expectation of the parties that the company should pay the bonds to the bondholders, but. on the contrary, that the Government should pay them to the bondholders, and the company should repay to the Government whatever amount it might pay. (U. S. *v.* U. P. R. R., 91 U. S., 72).

The rule is axiomatic, that a statute must be construed as an entirety, and that particular phrases, clauses, or even sections, may be modified and controlled by other provisons of the Act. And so in the case before the court, I insist that the expression in the third and fourth sections of the Act of February 11, 1852, to the effect that the companies should pay the principal and interest of the bonds, is controlled by the subsequent sections of the Act, which show that such payment was to be made to the State, and not to the bondholders.

The language of Justice Miller, quoted by our opponents, does not conflict with my position. He says that if the Arkansas Statute had declared that the bonds themselves constituted the lien, he would have no difficulty in holding "that the existence of the lien was coextensive with the bonds, in whose hand ssoever they might be found, until they and the lien, were both extinguished by payment, *or* SOME OTHER FORM OF SATISFACTION." (Appellant's Brief, p. 176).

In this case I contend that the statute does provide for "a form of satisfaction," other than by payment to the bondholders, and the statutory requirement having been complied with, the companies are as fully discharged, as if they had made payment to the bondholders.

Appellant's counsel place great reliance upon the expression to be found in the third section of the Act of Feb. 11, 1852, "that, so soon as the bonds of the State shall have been issued for the first section of the road as aforesaid, "*they shall constitute a lien* upon said section, etc. * * * "and the State of Tennessee upon the issuance of said bonds and by virtue of the same shall be in-

vested with said lien or mortgage," etc. (L. & N. Trans., p. 1797–8).

Their contention is that the words, "they shall constitute a lien," mean that "the bonds shall be the conclusive and only evidence of the lien"; that they shall be "the security as well as the evidence of the debt"; that the verb "constitute" is used in the sense of "be," and that the meaning is the same as if it had been said that the "bonds *shall be* a lien." (Appellant's Brief, 174, 182, 177).

In the first place, if "the bonds are themselves the lien," and "the security as well as the evidence of the debt," there must be as many separate liens as there are bonds outstanding.

I have looked in vain into the law upon negotiable instruments, and railroad securities, to see if such instruments were ever issued before; and the nearest resemblance to them that I have been able to find, are debenture bonds issued by English corporations, and which are defined "to be instruments under seal, creating a charge, according to their wording, upon the property of the corporation, and to that extent, conferring a priority over subsequent creditors not possessed of such a charge." It will be noticed, says Mr. Jones, in his work on "Railroad Securities," that the English railway mortgages differ widely from those in use in America, in that, each creditor is there secured by a separate mortgage, while here one mortgage is made to secure all the mortgage creditors. (Jones on Railroad Securities, Sec. 72).

There are, however, several very essential differences between the English debentures and these bonds, as the legal effect of the latter is stated by our opponents:

First. The debentures create a charge upon the corporate property "according to their wording"; whereas, these bonds do no mention any charge or lien whatever.

Second. The debentures are executed by the corporations; whereas, these bonds are executed by the State of Tennessee, and the railroad companies are no where mentioned in or upon them.

Third. The lien or charge created by the debentures is vested in the debenture holders; whereas, the lien created by the Acts of 1852 is beyond all controversy vested in the State of Tennessee.

Fourth. Each debenture holder has a separate mortgage or lien, while it is certain that under the Acts of 1852, only one lien was created.

I think that our opponents will not be able to lay before the Court any precedent for the kinds of bonds they claim these to be; they must take, and maintain, an advanced step in the law of negotiable instruments, and conveyancing.

If "the bonds are themselves the lien," and "the security as well as the evidence of the debt," and if that lien belongs to the private individuals who hold the bonds, as claimed by our opponents, then I submit that the Acts of 1852, so far as they attempt to give such a lien to the holders of those particular bonds, are unconstitutional and void.

The Constitution of Tennessee adopted in 1834, and which was in force when the Acts of 1852 were passed, contains the following provision: "The Legislature of Tennessee shall have no power to suspend any general law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals rights, privileges, immunities or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law; provided, always, the Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good." (Tennessee Constitution, Art. XI, Sec. 7).

The general law in force in Tennessee in 1852, relative to mortgages is contained in the following sections of Thompson & Steger's Code:

SECTION 2030. "The following writings may be registered * * * all mortgages and deeds of trust of either real or personal property."

SECTION 2075. "Any of said instruments not so proved or acknowledged, and *registered* or noted for registration, shall be null and void as to existing or subsequent creditors of, or *bona fide* purchasers from the makers, without notice, and in case of marriage contracts, shall be void as to existing or subsequent creditors of the husband, or purchasers from him without notice."

It is not pretended that the bonds now in controversy were ever registered as liens, or mortgages, or deeds of trust; consequently, if they be such instruments as counsel claim, they are null and void as against the subsequent mortgages made by railroad companies after their debts to the State were paid.

The general law of Tennessee, requiring the registration of mortgages and deeds of trust, could not be suspended by the Legislature for the benefit of the particular railroad companies mentioned in the Acts of 1852, nor for the benefit of the particular individuals who have purchased the bonds issued under those Acts; nor could the Legislature pass a law for the benefit of those particular companies, or those particular bondholders inconsistent with the general law requiring the registration of instruments creating liens upon property. To give to those bonds the same effect as if they were registered, would be to grant a special privilege to such persons, be they many or few, as might purchase those particular bonds—a privilege that would not be enjoyed by the holders of any other unregistered mortgages or deeds of trust.

12 Heis., 109, McKinney *v.* Hotel Company.
2 Yerg., 599, Bank *v.* Cooper.
3 Humph., 490, Budd *v.* State.
2 Sneed, 119, Mayor, etc., *v.* Dearmon.
6 Cold., 235, State *v.* Staten.
9 Baxter, 240, Memphis *v.* Fisher.
2 Head, 282, Morgan *v.* Reed.

It will be noticed that the inhibition against the passage of partial laws contained in the Constitution of Tennessee, though aimed at individuals and corporations, has no application to the State itself. Therefore, while the Legislature would have no right to say that an unregistered lien in favor of a particular corporation, or of particular individuals, should have the same effect as if it were registered, the Legislature would have the perfect right to say so, with reference to a lien declared in favor of the State. If, then, the lien created by the Acts of 1852 belongs, as we contend, to the State of Tennessee, those acts are constitutional, notwithstanding they give the lien the same effect as if it were registered; but if the lien belongs to the private individuals who hold the bonds, then the acts would be unconstitutional.

If the construction of our opponents will force the Court to hold the acts to be unconstitutional, while our construction will sustain their constitutionality, our construction ought to be preferred. The rule, as stated by Judge Cooley, is, that "whenever an act of the legislature can be so construed and applied, as to avoid conflict

with the constitution, and give it the force of law, such construction will be adopted by the courts. (Cooley's Con. Lim., p. 185).

Again, if, as our opponents contend, the words "they shall constitute a lien," are to convey the same meaning as if it had been said that the bonds shall *be* a lien, we are led into a palpable absurdity. It is agreed by all that whatever lien was created by the Acts of 1852, that lien was vested in the State of Tennessee) Now, if the bonds are themselves that lien, then they (the bonds. are vested in the State. But the State, after issuing the bonds to the companies had no further right or title to them, and therefore the bonds could not be vested in the State. We are therefore forced to conclude that the bonds themselves cannot be the lien. Their issuance may constitute the lien, but it is impossible that they could be themselves the lien.

Again, the Acts of 1852 do not constitute or make the bonds a lien; the language is, that so soon as the bonds are issued, "they shall constitute a lien." (L. & N. Trans., p. 1797).

If the language had been that the bonds, so soon as issued, "shall be constituted a lien," the contention of our opponents would have some force; but, instead of saying that they shall be constituted a lien, the language is that "they shall constitute a lien."

The Acts of 1852 use the word "constitute" in its active sense, as implying something which the issuance of the bonds is to do or perform; whereas our opponents construe it as if it were used in its passive sense, and as implying something already done and performed.

The word "constitute" is thus defined by the following lexicographers: Anthon's definition is "to place, set, or lay anybody or anything anywhere, to set or put down, to erect, make, found, build, establish anything." Richardson's definition is "to cause, or make, to pay; to fix, settle, establish or confirm; to ordain, decree, appoint or determine." Johnson's definition is, "to give formal existence; to make anything what it is; to produce, to erect, to establish." Walker's definition is: "to produce, to appoint, to erect, to establish." Sheridan's definition is: "to produce, to appoint, to erect, to establish, to depute." Knowles's definition is: "to erect, to establish." Webster's definition is: "to cause to stand, to establish, to set, to enact." Worcester's definition is: "to build up, to establish, to institute."

The above are the original meanings of the word, and though in the later editions of Webster and Worcester, it is also given a passive meaning, and is used in the sense of "to be," yet this is a secondary, and quite a modern use of the word.

It will be seen that all of the authorities just quoted agree that its original meaning was "to establish." I insist therefore, that the expression should be construed as if it had been said, that so soon as issued the bonds shall "establish or create a lien," &c.

That the Legislature of Tennessee understood very well the difference between the words "to constitute" and the words "to be," is manifest from the statutes of that State, which our opponents have cited in their own brief. (Appellant's Brief, pp. 176–177).

The Code, section 2980, provides that "judgments and decrees * * * shall *be* a lien upon the debtor's land from the time the same were rendered."

In that case, the act of the court, in rendering the judgment, constitutes or creates a lien; the judgment, after it is rendered, *is* a lien.

It will be noticed that the Code does not say that the judgment itself constitutes a lien.

Section 1991 provides: that any debt contracted by the master, &c., of any steam or keel boat, &c., on account of any work done, &c., "shall *be* a lien upon such boat," &c. In that case, the act of contracting the debt constitutes or creates a lien; after the debt is contracted it *is* a lien. But it will be noticed that the statute does not say that the debt shall constitute a lien.

Section 3539 provides: "that any debt by note, account, or otherwise, created for the rent of land, *is* a lien on the crops," &c. In that case, the creation of the debt for rent constitutes a lien; but the debt, after it is created, *is* a lien. It will be noticed that the statute does not say that the debt shall constitute a lien.

In other words, when the Legislature of Tennessee wishes to say that a thing *is* a lien, or shall *be* a lien, it uses that exact form of expression, as shown by the sections of the Code just quoted from appellant's brief; and when it wishes to say that a thing shall constitute or create a lien, it uses that precise expression, as shown by the Acts of 1852.

Our opponents cite the case of Osborn *vs.* Royer, 1 Lea, 218, Judge Cooper delivering the opinion of the Supreme Court of

Tennessee. In that case Osborn held the title bond of Crawford to a tract of land, and sold the land to Royer, transferring to him the title bond, and taking from him a note, containing a recital in its face that the note should constitute a lien on the lands. Royer delivered the title bond to Crawford, and received from him a deed to the land; Osborn transferred the note to Kirkpatrick, who filed a bill upon the note against Royer, to enforce the vendor's lien.

There were but two questions in the case:

1st. Whether, under the laws of Tennessee, an equitable mortgage could be created by the mere execution of a promissory note: and 2d, whether the land was sufficiently described in the note to identify it. Both of those questions were decided in the affirmative, but there was not the slightest discussion of the question as to whether the correct meaning of the word "constitute" is "to establish," or "to be."

I think our opponents will have some difficulty in showing, that Judge Cooper has ever been of the opinion that the bonds loaned by the State of Tennessee to railroad companies, are liens upon the roads; inasmuch as he filed the bill for the State of Tennessee against the delinquent roads of that State, under which a decree was rendered, deciding that the bondholders had no lien whatever, and that the State had the exclusive right to the lien; in fact, it was under that decree, that the Memphis, Clarksville, & Louisville Railroad was purchased by the Louisville & Nashville Railroad Company.

The same eminent judge, in the case of Ragan & Buffett *v.* Akin, 9 Lea, 609, delivered the opinion of the Supreme Court, which recognized and enforced the rights of a party who claimed through the purchaser of the Rogersville and Jeffersonville Railroad—a road which was sold under the same decree.

Our opponents construe the words, they "shall constitute a lien," etc., as if they stood alone, or as if they were the only operative words in the sentence in which they occur; but, such is not the fact.

The provision of the third section of the Act of February 11, 1852, is that so "soon as the bonds of the State *shall have been issued*," . . . . "they shall constitute a lien," etc., ... and "that the State of Tennessee, *upon the issuance of said bonds*,

and by virtue of the same, shall be invested with said lien," etc. (L. & N. Trans. 1797–8.)

The provision of the third section of the Act of January 15, 1852, is that "so soon as the bonds are issued," . . . . "the said bonds shall, *on issuance* thereof, constitute a lien," etc., . . . "and the State shall be invested with such lien on and *by virtue of the issuance* of said bonds." (L. & N. Trans. 1740–1).

As both of said acts were passed at the same session, and form parts of the same system, they must mean substantially the same; and their meaning is, that the *issuance* of the bonds, and not the bonds themselves, shall constitute the lien.

In whatever way the lien may be constituted or established, both of said acts expressly provide, that the State shall be vested with the lien, on and by virtue of the *issuance* of the bonds.

Now, if the issuance of the bonds is to vest the lien in the State, it must be the issuance of the bonds that constitutes or creates the lien. There is to be no lien in favor of the State, nor of any one else, until the bonds are issued, but the moment they are issued they create or constitute a lien. They might be signed by the Governor and Secretary of State, and have the seal of the State impressed upon them, and remain in the Governor's office for years, without ever creating a lien upon anything; but so soon as they are issued, then the State, by virtue of the fact of their issuance, becomes entitled to the lien.

The meaning of the statute is therefore precisely the same, as if it had said that the "issuance" of said bonds shall constitute a lien. If then, it is their issuance, and not the bonds themselves, which constitutes or creates the lien, the bonds are not liens in and of themselves.

The Act of February 11, 1852, and January 15, 1852, both provide that the lien created by said acts shall be *vested* in the State. (L. & N. Trans. 1741–1795).

Our opponents contend, however, that the lien is vested in the State, as their trustee, to secure their bonds to them. This, however, is a mere assumption upon their part, based upon their other assumption that the lien was reserved to secure the payment of the bonds to the bondholders. They do not pretend that the State is anywhere mentioned as a trustee in the act; they do not pretend that any trust whatever is specified in the act; they do not pretend

that the word trustee is anywhere used in the act; certainly there is no mention of any trust in favor of the bondholders; in fact, the word "bondholder" does not occur in the act.

Abbott's Law Dictionary, in defining the word vest, says that "a statute, or a deed, is said to vest an estate in some person, or to vest a person with the estate—meaning to confer the *ownership* in the subject upon him; or an estate is said to vest or becomes vested in a person when it becomes *his.*" (Abbott's Law Dictionary, p. 632).

Inasmuch, then, as the acts referred to "*vest*" the lien in the State, we are entitled to start out with the legal presumption in our favor, that the intention was that the lien should belong to the State, not as mere trustee, but as absolute owner; and the burden is thrown upon our opponents to overcome this legal presumption, and to satisfy the Court, with reasonable certainty, that the lien was vested in the State as a mere trustee.

Even where trusts are attempted to be created by parol, against private individuals, the proof "must be clear and explicit, and point out with certaintity both the subject matter of the trust, and the person who is to take the beneficial interest; casual and indefinite expressions are insufficient to raise a trust." (Perry on Trusts, sec. 77).

If such a rule applies in favor of an individual, where the attempt is made to deprive him of his property, by affecting it with a trust, how much stronger ought the rule to be in favor of a sovereign State, when it is proposed by mere argument, based upon casual and indefinite expressions used in a statute, to deprive the State of the ownership of a lien, for which she had advanced a valuable consideration, and the ownership of which lien was absolutely essential to the financial existence of the State; for I will undertake to show, that if the State of Tennessee had not reserved to herself the absolute ownership of the lien referred to, she would have been bankrupted in 1870, beyond the possibility of recuperation.

There is another reason why we cannot believe that it was ever intended to vest the lien in the State as a mere trustee. While we admit that a sovereign State may sustain the character of a trustee, yet, as the State of Tennessee was not subject to suit when the Acts of 1852 were passed, and as no court possessed jurisdiction at that time to enforce such a trust against the State, we cannot believe that

either the railroad companies, or the bondholders, would ever have agreed, to repose so important a trust, in a trustee that was not amenable to the laws of the land.

X.

The fifth section of the Act of February 11, 1852, prescribes how the companies were to pay the interest upon the bonds loaned to them by the State. It enacts, "that it shall be the duty of said company to deposit in the Bank of Tennessee, at Nashville, at least fifteen days before the interest becomes due, from time to time, upon said bonds issued as aforesaid, an amount sufficient to pay such interest, including exchange, and necessary commissions, or satisfactory evidence, that said interest has been paid or provided for." (L. & N. Trans., 1799).

It will be noticed that the statute, instead of requiring the company to pay the interest to the bondholders, required it to deposit an amount, equal to the interest, in the Bank of Tennessee, fifteen days before the interest became due upon the coupons from the State to the bondholders; but our opponents contend that the Bank of Tennessee was not the treasury of the State, and that the State was a mere stockholder in the bank; that the company was not directed to pay the interest into the treasury of the State, but was required to deposit in the bank an amount sufficient to pay such interest; that the bank therefore was the agent of the company to transmit the interest to the bondholder, and not the agent of the State to receive and transmit the interest for the State. This contention makes it proper to get a correct view of the status of the Bank of Tennessee.

I have already shown that the bank was established by an act passed January 19, 1838, in the name and for the benefit of the State; that the faith and credit of the State were pledged for the support of the bank; that the State owned all of the stock of the bank, and appointed and controlled all of its officers. (L. & N. Trans., 1615).

It is stipulated by counsel, that "as long as the Bank of Tennessee was in operation, *it was regarded as the fiscal agent of the State*; that the State Treasurer kept none of the State's funds in his hands, but deposited all the revenues of the State in the Bank of Tennessee; and that the Bank of Tennessee paid the interest on all the

bonds of the State, without reference to the purpose for which they were issued. (L. & N. Trans., 1034).

The interest upon all of the bonds loaned to the railroad companies under the Acts of 1852 was payable either at Philadelphia or New York, and when the Acts of 1852 were passed, the Act of February 9, 1850, was in force, the third section of which was as follows: "That the Treasurer shall also pay out of said dividends (of the Bank of Tennessee), or any other monies in the treasury not otherwise appropriated, the interest upon the outstanding bonds of the State, that may from time to time become due, upon the warrant of the Comptroller; provided, however, that the Bank of Tennessee *shall act as agent of the Treasurer* in paying the interest, that may be due and payable at Philadelphia and New York." (L. & N. Trans., 1729).

We have, therefore, not only the stipulation of counsel that the bank was the fiscal agent of the State, but we have the mandate of the statute, that in paying the interest due at Philadelphia and New York, the bank should act as agent of the Treasurer. When the Legislature of 1852 required the railroad companies to deposit in the Bank of Tennessee, an amount sufficient to pay the interest upon the bonds borrowed by them, it was of course known that the bank was the fiscal agent of the State, and that in paying the interest upon said bonds in New York and Philadelphia, the bank would act as agent of the Treasurer of the State, and not as agent of the railroad companies.

Our opponents refer to the fact, that the fifth section requires the company to deposit in the bank, a sum sufficient to pay exchange and commissions, in addition to the interest; they say that said commissions were the compensation to be paid by the company to the bank, for transmitting the interest to New York; and that the requirement is an evidence that the bank (in transmitting the interest) was regarded as the agent of the company.

We need only say, in reply to this, that the exchange and commissions were required to be paid into the bank, not as compensation to the bank, but in order that the State might transmit the interest upon her bonds to New York, without the loss she would have sustained, if she had not exacted the exchange and commissions from the company.

Our opponents place stress upon the circumstance that the fifth

section, instead of saying that the company shall "pay" the money into bank, directs that it shall "*deposit*" it. Admitting that there is a difference between the ordinary meaning of the words "pay" and "deposit," I submit that the word "deposit" is frequently used as equivalent to the word "pay"; as, for instance, where a man deposits money in a bank, to take up a note or draft. Such a deposit, in actual practice, is regarded as, in substance, a payment.

But, giving to the word "deposit" the strict meaning insisted upon by our opponents, the consequence claimed by them would not follow; for, conceding that the statute simply required the company to deposit the money, it does not require that the deposit shall be made in the name of the company; on the contrary, the object of the statute was that the deposit should be for the benefit of the State. That this is so, is shown by an act passed at the same session, just a week before the Act of February 11, 1852, was passed. I refer to the Act of February 4, 1852, which provided, that for the purpose of enabling the East Tennessee & Georgia Railroad Company, to raise a fund for the payment of the principal and interest on certain bonds, loaned to that company by the State, said company should be authorized to collect certain bridge tolls. It required the company "to render a monthly account thereof, and pay over monthly the said sum, in some bank at Knoxville, taking the receipt of the bank therefor, and the sum so *deposited* in bank shall, at all times, be subject to the check of the Comptroller of the Treasury, for the payment of the interest on said bonds, and any overplus, after the payment of said interest, shall be passed to the credit of the said company, *in discharge of the principal due on any one, or more of said bonds.* (L. & N. Trans., 1794).

It will be seen that in the clause just quoted, the word "pay" is used as synonymous with the word "deposit"; the amount which the company was to pay," is spoken of as "the sum so *deposited.*"

It will also be seen that though said company was to make the deposit in the bank, the deposit was to be made, not in the name of the company, nor for its benefit, but for the benefit of the State, and subject to the check of the Comptroller of the State.

The fifth section of the Act of February 11, 1852, itself furnishes another illustration of the use of the word "deposit," as synonymous with the word "pay." Said section provides that if the company

fail to deposit in the Bank of Tennessee, an amount sufficient to pay the interest upon the bonds loaned to it, the Governor shall appoint a receiver, who shall operate the road, under the direction of the Governor; and then follows this clause: "the Comptroller shall, from time to time, settle the accounts with the receiver, and the balance shall be *deposited* with the Treasurer of the State." (L. & N. Trans., p. 1800). It is manifest, that it was not expected that the Treasurer should act as a banker for the receiver: the money thus deposited, was in fact *paid* into the Treasury; for there was no power given to the receiver to withdraw the deposit from the Treasury.

That I am right in my contention upon this point, is shown by the practical construction placed upon the Act of February 11, 1852, by the Treasurer and other officers of the State of Tennessee, by the officers of the Bank of Tennessee, by the correspondents of that Bank in New York and Philadelphia, and by the holders of the bonds loaned by the State to the railroad companies.

The following facts are stipulated by counsel to be true:

First. That there was one account on the books of the Bank of Tennessee headed "Treasurer of Tennessee," which was credited by the revenues of the State deposited by the Treasurer, and by the dividends derived from the State's stock, in certain banks, and in the various internal improvement companies, in which the State was a stockholder; and was debited by the interest on the entire State debt, paid by the Bank of Tennessee, and by such other sums as were drawn by the Treasurer, under appropriations made by law. There was also an account on the books of the Bank of Tennessee, headed "Interest Paid on State Bonds," the object of which was to show the exact amount paid on that account; but it showed nothing as to whom, or for what purpose, the bonds were issued, upon which such interest was paid. There was also an account headed "Railroad Companies for Interest," showing the amounts and dates of all payments into the bank by the different companies; but it did not show that the payments were to be appropriated to the interest upon any particular bonds of the State, nor did the bank in fact know, what bonds had been issued to any named railroad company. The funds paid in by all the railroad companies, *were transferred either to the Treasurer's general account, or to the account headed "Interest on State Bonds."* (L. & N. Trans., p. 1035).

Second. In the Treasurer's books an account was headed "Bank of Tennessee," the reverse of the account kept under his name at said bank. There was also an account headed "Interest on Capitol Bonds," in which was shown the interest paid on the bonds issued to pay for the State-house. There was also an account headed "Interest on Internal Improvement Bonds." It showed the gross amount paid out on such bonds, but it did not show by whom the money was furnished, nor did it show the number or character of the bonds on which the interest was paid. *There were no separate accounts with the different railroads to be found on the Treasurer's books.* With the exception of the distinction between Capitol and Internal Improvement bonds, *the Treasurer made no difference between the various bonds of the State, but treated all as equally the obligations of the State.* (L. & N. Trans., p. 1037).

Third. The Merchants Bank of New York and the Bank of North America, were the correspondents through whom the Bank of Tennessee paid the interest on the State debt. The moneys paid in by the railroad companies were sent by the Bank of Tennessee, with other funds, to New York and Philadelphia, where they were paid out by the correspondents aforesaid, upon coupons of the State, *making no distinction between the different bonds of the State. Said correspondents kept no accounts with the railroad companies, and did not know to whom the bonds were issued, the coupons of which they were paying. Said correspondents would return the coupons to the Bank of Tennessee, by whom they were returned to the State.* (L. & N. Trans., pp. 1034–5.)

Fourth. *No holder of bonds loaned by the State to the railroad companies ever presented a coupon to a railroad company for payment; no railroad company had any banker or other correspondent in New York, to pay the coupons on the State bonds loaned to it; no company ever obtained possession of the coupons that had been paid on the bonds loaned to it.* (L. & N. Trans., p. 1034). This course of dealing with the subject was continued from 1852 up to the commencement of the late war. (L. & N. Trans., p. 1036).

All parties connected with the transactions construed the Act of February 11, 1852, requiring the companies to pay or deposit the money in the Bank of Tennessee, as requiring a payment to the State, and when so paid or deposited, it was treated as the money of the State; it was mingled with the other funds of the State, and used

indiscriminately in paying the interest upon all the bonds of the State, without regard to the series or numbers of the bonds, and without regard to the object for which the bonds had been issued. I submit that if there be any doubt as to the meaning of the word "deposit," as used in said statute, that doubt must be solved in accord with the practical construction of the parties most interested in the question.

It will be noticed that the fifth section of the Act of February 11, 1852, required the company to deposit in the Bank of Tennessee, at Nashville, at least fifteen days before the interest became due upon the bonds, an amount sufficient to pay such interest, including exchange, &c., *or satisfactory evidence that said interest had been paid or provided for.* Now, though a company might possibly have *purchased* the coupons from the holders, they could not have been *paid* fifteen days before they were due. The word "paid" in that clause, means paid to the State. The interest was due to the State, fifteen days before the maturity of the coupons, and therefore the company might properly pay it to the State, before the coupons matured.

In some instances the companies had funds in New York, and instead of paying the money into the Bank of Tennessee at Nashville, with commissions and exchange on New York, they would pay it to the correspondents of the Bank of Tennessee at New York, so as to save the exchange; and in such cases they would file with the Bank of Tennessee, evidence that they had made such payment to its correspondent in New York, and that was taken as payment to the Bank itself.

In other instances, the companies would not have the ready money with which to pay the interest, but they would make arrangements with other banks, to furnish them the money, in time for the Bank of Tennessee to use it in payment of the interest, when it should mature. When evidence of such arrangements was presented by the companies to the Bank of Tennessse, and the arrangements were satisfactory to that bank, the companies were regarded as having "provided" for the interest, and therefore were not required to pay it into the bank. Such I understand to have been the meaning of the requirement, that the company should either pay the interest into the bank at Nashville, or furnish to the bank "satisfactory evidence that said interest had been paid or provided for."

The fifth section of the Act of February 11, 1852, directed that if the company failed to deposit the interest in the Bank of Tennessee as aforesaid, the Comptroller should report the fact to the Governor, and the Governor should immediately appoint a receiver, at the expense of the company, to take possession of the railroad and the assets thereof, and manage the same, and receive the rents, issues and profits thereof. The receiver was required to give bond to the State, for the faithful discharge of his duty as receiver, to receive said rents, issues, profits and dividends, and pay over the same under the direction of the Governor towards the liquidation of such unpaid interest. If the company refused to deliver possession of its road to the receiver, the Governor was authorized to issue his warrants to the sheriffs of the counties through which the road ran, commanding them to seize the road, and to place the receiver in possession thereof. He was to continue in possession of the road, and manage it, until a sufficient sum should be realized, exclusive of the costs and expenses incident to said proceedings, to pay off and discharge the interest aforesaid, due on said bonds; which being done, the receiver should surrender the road to the company. Then follows this provision: "The Comptroller shall, from time to time, settle the accounts of the receiver, and the balance shall be deposited with the Treasurer of the State. The Comptroller is authorized, and it is made his duty, upon his warrant, to draw from the Treasury, any sum of money necessary to meet the interest on such bonds, as may not be provided for by the company, as provided for in this Act, and the Comptroller shall report thereof to the General Assembly, from time to time." (L. & N. Trans., 1799, 1800).

It will be noticed that the receiver could not be appointed until the company had failed to pay its interest to the Bank of Tennessee; and that the company could not be required to make that payment, until within fifteen days of the time when the interest should fall due from the State to the bondholders. If the company had not been able, for the preceding six months, to earn enough to pay its operating expenses and the interest upon its debt to the State, it could not have been expected that a receiver could earn the expenses and interest in fifteen days. It would require nearly that much time for him to take an inventory of the property, and appoint his officers and agents. It could not have been contemplated that the State would allow its coupons to go to default in New York, for at that

time, it had never allowed any of its obligations to go to default. It was therefore necessary that the Comptroller should have authority, without waiting for any further legislation upon the subject, to draw his warrant upon the Treasurer, to pay any sum of money necessary to pay the interest on the bonds, and therefore the provision to that effect was inserted in the statute. It is said, however, that it does not appear that there was money enough in the Treasury of the State to meet such sudden and large demands; but it must be remembered that the State and the railroad companies were all very sanguine at that time that the companies would be able to pay their interest to the State; as a matter of fact, there was but one of them that did fail before the war, and if the roads had not been so badly damaged by the war, it is doubtful whether any other failures would ever have occurred. The State not only had high credit in New York, but it commanded the entire capital of the Bank of Tennessee. The largest amount of bonds issued to any company prior to the war did not exceed $1,602,000; the semi-annual interest upon which was only $48,060, (L. & N. Trans., 506); and there never was a day, before the war, that the Treasurer of Tennessee could not have obtained that amount from the Bank of Tennessee, whether there happened to be any money in the bank at the time belonging to the State or not. (L. & N. Trans., 2141). Our opponents allude to the fact that the receiver's bond is conditioned to receive the rents, issues and profits, and pay over the same under the direction of the Governor, towards the liquidation of the unpaid interest; and they contend that the words "unpaid interest" mean the interest unpaid to the bondholder. I have already shown that it was never contemplated by any one at that day, that the State would allow her coupons to be in default for an hour. She expected to pay them to the holders when they matured. The "unpaid interest" which the receiver was to liquidate under the direction of the Governor, was the interest unpaid by the company, and due from the company to the State. The State, having paid the interest when it fell due to the bondholder, retained possession through its receiver, of the road, and collected the rents, issues and profits until they amounted to enough to pay the State, the amount which the company ought to have paid. The receiver was to settle his accounts from time to time with the Comptroller, and after deducting the costs and expenses of operating the road, he was to pay to, or deposit, with the Treasurer of the State, the balance as

it should appear at each of those accountings. The Governor was to see when those balances so paid into the Treasury, amounted to enough to pay the interest due from the company to the State, and then he was to permit the receiver to surrender the road to the company; and this is what was meant by "liquidating the unpaid interest under the direction of the Governor."

Our opponents theory is, that the State, as trustee for the bondholders, appointed the receiver for their benefit; that it was expected that the State would allow its coupons to remain in default, until the receiver could earn enough to pay them off; that the receiver, in settling his accounts with the Comptroller, was to be allowed a credit, not only for the costs and expenses of operating the road, but also for the payments of interest made by him to the bondholders, and that the balance which he was to pay into the Treasury, was the balance left, after deducting said interest, as well as the costs and expenses.

The objections to that theory are: First, There is nothing in the statute from which a trust in favor of the bondholders can be fastened upon the State, as I have heretofore shown.

Second, The receiver is to be appointed by the Governor of the State, his bond is to be made payable to the State, and nothing is said in the statute, intimating that he is to act as receiver for any one except the State. The Supreme Court of Tennessee have decided that such a receiver is an officer of the State, and therefore "a public agent *of the State.*"

Erwin *v.* Davenport, 9 Heisk., 47.

Third, In order for their theory to stand at all, we must suppose that it was contemplated at that day, that the State of Tennessee would allow her coupons to remain in default; a supposition which I have just shown, it is impossible for us to make, in the light of the financial history of that State.

The great value of the fifth section consists in the fact, that it defines, with precision, what shall be regarded as a default upon the part of the company, with reference to the payment of interest. If the company makes the payment, or deposit, in the Bank of Tennessee, by the time specified in the section, then it is clear beyond argument, that no receiver could be appointed either by the Governor, or by judicial proceedings. The Governor's power of appointing a receiver, being strictly statutory, he could

not appoint one, when the condition imposed by the statute, had been fully complied with by the company. A receiver could not be appointed under judicial proceedings, because the railroad companies were not personally liable upon the bonds; the lien upon their property, being the only liability imposed upon them by the statute—and that lien being purely statutory, no court could declare any act to be a default, unless the statute creating the lien so declared. The result was, that so long as the companies paid their interest into the Bank of Tennessee, by the time prescribed by the statute, they would be in no default, either to the State or to the bondholders. If, however, they should fail to pay their interest at the time directed by the statute, then the Governor was to appoint a State receiver, and put him in possession of the road. Such receiver could not be interfered with by any subsequent appointee of a court, even if the court should incline to the view that the lien belonged to the bondholders. The receiver would be bound to pay the balances, after deducting the costs and expenses of the receivership, into the Treasury of the State, and the bondholders, even if they had a lien, would have had no way to compel the State to surrender those balances to them. Inasmuch then, as it would be absurd to suppose, that the statute intended to give a lien to the bondholders, which they could never render effective, we are bound to conclude that the lien was not intended for them.

That the requirement of the fifth section to the effect, that the railroad companies should pay into the Bank of Tennessee, fifteen days before the interest fell due, an amount sufficient to pay said interest, etc., was not made for the benefit of the bondholders, is shown by the fact, that on January 30, 1856, an Act was passed, directing the Governor to issue State bonds "to the State Agricultural Bureau"; and section eight of said Act contains this provision: "It shall be the duty of the State Agricultural Bureau, to deposit in the Bank of Tennessee at Nashville, at least fifteen days before the interest becomes due, from time to time, upon said bonds issued, as aforesaid, an amount sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that said interest has been paid or provided for. (L. & N. Trans., 1862).

Now, the Agricultural Bureau was one of the departments of the State Government, and of course, there was no lien reserved in the

Act upon the property of said Bureau; and yet we find that the requirement with reference to the payment of interest by said Bureau, is an exact copy of the requirement with reference to the payment of interest by the railroad companies, contained in the fifth section of the Act of February 11, 1852.

On May 16, 1871, an Act was passed, to amend the railroad law, which made "it discretionary with the Governor to appoint receivers as therein provided, or to permit the officers of the several railroads of the State, to remain in the hands and under the management of the company owning the same, as the interest of the State may suggest." (L. & N. Trans., 1910).

On July 1, 1861, an Act was passed, making it "the duty of the various railroad companies, to *pay* the interest required of them, into the hands of the Treasurer," instead of into the Bank of Tennessee; (L. & N. Trans., 1910) and by an Act passed January 26, 1869, it was enacted that it shall be the duty of each railroad company, to whom has been issued the bonds of the State, at least fifteen days before the interest becomes due, from time to time, to *pay* the amount of such interest, including exchange and necessary commissions, to the Comptroller of the State. (L. & N. Trans., 1975.)

It will be noticed that instead of regarding the receiver as a receiver for the bondholders, he was regarded as a receiver for the State; instead of it being obligatory upon the Governor to appoint him to collect the interest for the bondholders, it was left discretionary with the Governor, and in the exercise of his discretion, he was to act "as the interest of the State (alone) might suggest;" instead of directing the interest to be paid into the Bank of Tennessee, a corporation, which, as it has been said, was subject to the jurisdiction of the courts, the companies were ordered to "pay" the interest first, to the Treasurer, and afterwards to the Comptroller of the State, where the money would certainly be beyond the reach of any judicial process, that could be invoked by the bondholders.

I call attention in passing, to the further fact, that in both of the acts last cited, instead of saying that the interest shall be "deposited," it is said that it shall be "paid" to the Treasurer, or Comptroller; additional illustrations of the use by the Legislature of Tennessee, of the words "pay" and "deposit," as substantially synonymous.

If our opponents are correct in their theory, that the interest was to be paid into the Bank of Tennessee by the railroad compa-

nies, in order that said bank as agent of the railroad companies, should transmit it to the bondholders in New York, it would seem that the bondholders had the right to protest by suit or otherwise, against the change which was made, when the Legislature ordered the interest to be paid to the Treasurer or the Comptroller. This was a material impairment of the bondholders contract, if they are correct as to what their contract rights were; for, instead of the companies paying or depositing the interest in the Bank of Tennessee, where it might be subject to judicial process at the instance of the bondholders, it was to be paid into the hands of the officers of the State, where it could not be reached.

The interest on the bonds loaned to the railroad companies involved in these causes, has not been paid since July 1, 1861, with the exception of some interest paid in 1867–8, and some paid in 1874–5.

The United States Circuit Court was reopened in Nashville, after its capture by the United States army, in February, 1862, and has remained open to the bondholders ever since. (L. & N. Trans., pp. 1037, 1040).

If our opponents are right in their construction of the acts of 1852, they would certainly have applied to the Governor for the appointment of receivers for every railroad in Tennessee; and if he had refused their application, they would probably have applied for a *mandamus* to compel him to appoint receivers for their benefit; or if they had feared that a *mandamus* would not lie, owing to the discretionary power vested in the Governor, then they would naturally have applied to some court, either State or Federal, for the appointment of receivers, under judicial proceedings; and yet it is stipulated by counsel, that no such attempt was ever made by the bondholders. (L. & N. Trans., 1037). There is no reason, whatever, why the bills, which were filed in these causes in 1879, were not filed in 1862, if the appellant's equities are such as are now claimed. Many of the railroads involved in these causes would, at any time, have sold for enough to pay all the interest due to the bondholders; and yet the bondholders have never made any attempt to collect it, from the railroad companies, by application to either the Governor, or the courts, for a receiver; in fact, they have never presented a single coupon to any of the railroad companies of Tennessee, for payment.

The Louisville & Nashville Railroad Company paid its entire debt to the State of Tennessee, on the 17th of November, 1865.

The interest due from the Memphis & Ohio Railroad Company, for the bonds loaned to it by the State, was regularly paid each six months, from July, 1867, to July, 1871; the semi-annual payments amounted to $71,883.30, and they were made mostly in cash, though some were made, in past due bonds and coupons of the State.

During most of that time the State was in default upon the interest due on said bonds, and yet the State was using for other purposes, the money which the Memphis & Ohio Railroad Company was paying, to enable the State to meet the interest on said bonds. (L. & N. Trans., p. 1046).

The holders of the bonds loaned to the Louisville & Nashville Railroad Co., and to Memphis & Ohio Railroad Co., made no objection to the payments which said companies made to the State; nor did they ever assert, by judicial proceedings or otherwise, any right to subject the money paid in by the Memphis & Ohio Railroad Company, as a trust fund, for the payment of their coupons.

The Memphis, Clarksville & Louisville Railroad Company was placed in the hands of a receiver, appointed by the Governor, on the — day of July, 1865, and it was operated by the receivers of the State, until it was sold under the bill filed by the State in 1871. (L. & N. Trans., 1040). Said receivers settled with the State, and none of the holders of the bonds loaned to that company, ever attempted to call said receivers to account, by judicial proceedings, or otherwise.

The Mississippi Central Railroad was placed in the hands of a receiver by the Governor, and the receiver collected and paid over to the Comptroller of the State various sums, from time to time, amounting in the aggregate to $110,000 in money. This money was paid into the State Treasury, like any other funds or revenues due the State, and was used by the State for its own purposes; (L. N. Trans., 1010–1011); and yet none of the holders of the bonds loaned to that company, ever attempted to prevent said receiver from paying over said funds to the Comptroller, nor did they ever make any demand, by suit, or otherwise, upon the Comptroller for said monies, as a trust fund belonging to them.

We therefore have the practical construction of the officers of the State, of the railroad companies, and of the bondholders, to the

effect, that the receivers contemplated by the Act of February 11, 1852, were not to be appointed for the benefit of the bondholders, and that the interest paid by the companies, or by the receivers, did not belong to the bondholders, but to the State; and this practical construction continued from 1861 to 1879, when the bills in these causes were filed.

XI.

The seventh section of the Act of February 11, 1852, prescribes how the companies were to pay the principal of the bonds loaned by the State. It enacts: "That at the end of five years after the completion of said road, said company shall set apart one per centum per annum, upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds, the company shall pay into the Treasury of the State, after assigning them to the Governor, and for which the Governor shall give said company a receipt; and as between the State and said company, the bonds so paid in, shall be a credit on the bonds issued to the company. And bonds so paid in, and the interest accruing thereon, from time to time, shall be held and used by the State as a sinking fund, for the payment of the bonds issued to the company; and should said company repurchase any of the bonds issued to it under the provisions of this Act, they shall be a credit as aforesaid and cancelled. And should said company fail to comply with the provisions of this section, it shall be proceeded against, as provided in the fifth section of this Act." (L. & N. Trans., 1801–2).

Our contention is, that the seventh section provides a mode of partial payments by the companies, which would have very nearly paid off their debts to the State, by the time the bonds loaned to them by the State, would have fallen due. The bonds paid to the State by the companies under said section, would not have fully equalled the amount of the bonds loaned to the companies by the State; but, their debts to the State would have been so greatly reduced, that the payment of any balance, could have been easily provided for.

Our opponents contend that the section simply provides for the creation of an ordinary sinking fund; that the bonds paid into that sinking fund by the companies were intended to furnish an additional security to the bondholders; and that the State was

a mere trustee for the bondholders, in the collection and management of the fund.

I think our position is the correct one, for the following reasons:

First, It will be noticed that the company was required to set apart one per cent. upon the amount of bonds issued to it, and to use the same in the purchase of "bonds of the State of Tennessee." There was nothing said as to what kind of bonds of the State were to be purchased. At the time said statute was passed, the State had outstanding about $4,000,000 of bonds. Some of them had been issued to pay for stock, for which the State had subscribed in certain banks, and in the various internal improvement companies referred to in the system of 1836–8; and some of them had been issued to pay for the State Capitol, and for other public purposes; but there was no pretense of a lien to secure the payment of any of them. Of course, the railroad company had the right to purchase any of the bonds of the State then outstanding, and to pay them to the State, under the seventh section of the act. Now, if when paid in, they were to be a sinking fund, to furnish additional security to the holders of the bonds loaned to the company, the question is, how would the State bonds, then outstanding, furnish such additional security? If the State should refuse to pay her bonds issued to the company, which were, at least upon their face, her own primary obligations, she would also refuse to pay her bonds which the company might have paid into the sinking fund; in a word, one bond of a State could furnish no additional security for the payment of another bond of the same State; if one was worthless, the other would be worthless—add nothing to nothing, and the sum will be nothing.

As I have just shown, we cannot presume that the seventh section intended to create a sinking fund, when we see that the company had the right to purchase such bonds, as would be utterly worthless to the bondholders for that purpose.

Second. But even if the section had directed that the one per cent. per annum should be invested in bonds of the State loaned to other railroad companies, and even if those bonds were liens upon the roads of the companies to whom they had been issued, as is now contended by our opponents, even such bonds as those ,would have been unavailable as a security for the bondholders; because the statute required that the bonds purchased with the one per cent., should be

assigned to the Governor, and paid into the Treasury of the State. There is no provision anywhere in the statute authorizing their sale by the Governor, or the Treasurer; and without subsequent additional legislation, no sale of them could be legally made. The bondholders could not by mandamus, or any other proceeding, compel the Governor or Treasurer to sell the bonds, in the absence of any statute authorizing such a sale; and we cannot presume that the Legislature would have created a sinking fund for the benefit of the bondholders, when the effect of the statute was to lock up the bonds in the Treasury of the State, without making any provision for disposing of them, or for appropriating their proceeds to the holders of the bonds loaned to the company paying them in.

Third. If our opponents are correct, the company was required, by the seventh section, to pay back twice as many bonds as it borrowed from the State; it would have to pay to the holders thereof, the bonds borrowed by it from the State, and it would also have to pay an equal amount of bonds to the State, in discharge of the sinking fund obligation. Although the company may have paid to the holders thereof the bonds loaned to it by the State, there was no provision in the statute authorizing the Governor or the Treasurer to return to the company the bonds which it had paid in as a sinking fund; nor was there any authority vested in either of said officers to sell said bonds, nor to pay over the proceeds thereof to the company, after it had paid the bonds loaned to it by the State; nor could the company, by any judicial process, get the bonds, or their proceeds, out of the Treasury of the State. If, then, the seventh section created a sinking fund for the benefit of the bondholders, it was utterly worthless as a security to them, while it was grossly unjust to the company.

It will be noticed that the section directs that the Governor shall give the company a receipt, and that, as between the State and the company, the bonds so paid in shall be a credit on the bonds issued to the company. The fact that the bonds paid in by the company, are to be a credit on the bonds issued to the company, is an evidence that a debt was created against the company, by the issuance of the bonds; and as that credit is to be given as between the State and the company, the State must necessarily be the creditor of the company for the bonds issued. We have here, another illustration of the fact, that the word "bond" is, at times, used in the statute in

a figurative sense. Our opponents would not be willing to admit that the bonds paid in by the company were to be a credit literally upon the bonds issued; it would be difficult to enter such a credit when the bonds were scattered all over the world. Our opponents will cheerfully concede that the word "bonds" in the clause referred to, is used figuratively, as the equivalent of the "amount of the bonds;" and they will agree with us, that the clause ought to be construed as if it read, "that the bonds so paid in, shall be a credit upon the amount of bonds issued to the company;" and yet, if the same interpretation is placed upon the same words in the third section, we will find that, instead of the lien being reserved for the payment of the bonds, it was reserved to secure the payment of an amount equal to the amount of the bonds—which is exactly our contention upon the construction of that section.

Our opponents contend, that as the bonds paid in by the company, were to be a credit upon the bonds issued to the company, "as between the State and the company," it evidences that there were other persons, as to whom the bonds paid in were not to be a credit; and they insist that those other persons were the holders of the bonds issued to the company.

There were several reasons for providing that the bonds paid in, should be a credit, as between the State and the company, upon the bonds issued to the company, either of which is more satisfactory than the reason suggested by our opponents.

First. As the debt upon which the credit was to be given, was a debt between the State and the company, it was natural that the credit should be allowed as between the State and the company.

Second. As it was expected that the bonds paid in by the company, might not be the bonds that had been issued to it, it was entirely proper to say, that the bonds paid in, should be a credit as between the State and the company, upon the bonds issued to the company, whether they were the same bonds or not. If the expression had not been used, it might have been insisted, though without reason, that the company was not entitled to a credit, as between it and the State, unless the company paid back the identical bonds issued to it by the State; and it was to exclude the possibility of such a contention, however unreasonable it might be, that the draughtsman was cautious enough to say, in so many words, that the bonds so paid in should be a credit, as between the State

and the company, though they may not have been the bonds issued to the company.

Third: If the bonds paid in by the company, were not the bonds issued to the company, the State would still remain liable upon the bonds issued to the company; and it may have been one of the objects of the draughtsman, to exclude the idea, that the payment by the company, should be regarded as a credit, *between the State and the holders of the bonds issued to the company.*

Our opponents refer to the fact that the payments by the company to the State, were not to commence until the end of five years after the completion of the road; that the twentieth section of the act contemplated that it would require four years within which to complete each section of thirty miles, and, consequently, that the payments by the company to the State, might not commence for many years after the first bonds were issued; and in that event the payments by the company would not suffice to pay off the debt from the company to the State, by the time the bonds loaned to the company matured.

I have already stated that the calculation upon which the seventh section was based, did not contemplate that the payments to be made by the company, would exactly equal the bonds loaned to it by the State, within the time said bonds were to run to maturity; but with ordinary expedition in the construction of the roads, the payments would have reduced the debt, from the company to the State, to an amount entirely manageable.

The Legislature, when it passed the Act of February 11, 1852, did not suppose that it was creating a system that was entirely perfect; on the contrary, the power was expressly reserved, in the twelfth section, to make such changes in the system as future events might suggest. And it will be seen, that before any considerable amount of bonds were issued under its provision, it was so amended as to require the payments by the companies, to begin five years after the issuance of the bonds, instead of after the completion of the roads.

Our opponents insist, that as it is expressly stated that the bonds paid in by the company, shall be used as a sinking fund for the payment of the bonds issued to the company, the bonds paid in cannot be regarded as partial payments of the debt from the company to

the State, but must be regarded as paid into an ordinary modern railway sinking fund.

It is probable that the sinking funds usually found in modern railway mortgages, were but little understood as early as 1852, in a State, like Tennessee, where there was not one hundred miles of railroad in operation, and where not more than one out of a hundred lawyers of the State had ever seen a railway mortgage.

The idea of a sinking fund out there, at that time, was a fund that sunk a debt; and therefore it was provided, that the State should use the bonds paid in, to sink, by degrees, the debt due from the company to the State. The term "sinking fund" was used in its popular, and not in its modern technical sense.

Our opponents refer to the fact that if the company should purchase any of the bonds issued to it, such bonds were to be, not only credited to the company, but cancelled; while no provision was made for the cancellation of any other bonds, that might be purchased and paid in by the company. They argue, from that omission, that it was contemplated that the company might purchase bonds, that had been issued to other railroad companies under the same act, and which were, according to the theory of our opponents, liens upon the roads of the companies, to whom they had been issued; that such bonds were to be retained uncancelled in the sinking fund, to be collected by the State, as trustee of the sinking fund, from the companies to whom they were issued, and if necessary, the liens reserved, were to be enforced by the State, to secure the payment of such bonds.

This suggestion of our opponents is ingenious, and would be troublesome, but for the fact that besides the bonds issued to other railroad companies under the Act of February 11, 1852, there were, as before stated, about $4,000,000 of bonds of the State of Tennessee outstanding, which had never been issued to any railroad company, and which were not liens upon anything; they were the unsecured bonds of the State.

Now, if a company should purchase such non-lien bonds of the State, they were to remain uncancelled in the sinking fund, precisely the same as the bonds issued to other railroad companies; and if the object of retaining the bonds issued to other railroad companies in the sinking fund, uncancelled, was to enforce the lien and collect the money from those companies, what was the object of re-

taining the straight non-lien bonds of the State, uncancelled in the same sinking fund? They could not have been retained there to enforce any lien, nor to collect them by any sort of process from the State; and if they were not retained for such purpose, why will it be insisted that the bonds issued to other railroad companies were retained for that purpose?

As I have just before stated, the framers of the Act of February 11, 1852, did not have the advantage of the experience of to-day in regard to partial payments, and sinking funds. It would be quite clear to the average legislator of that day, that if the company paid in a bond which had been loaned to it by the State, that bond ought not only to be credited, but cancelled; but when it came to other bonds, whether they were the straight bonds of the State, or the bonds issued to other railroad companies, it was not so easy to see why they should be cancelled, and, therefore, nothing was said, the one way or the other, about their cancellation. If their retention, uncancelled, could serve no other purpose, they would be at least as convenient, as counters in whist, and would enable the State officers to keep the run of the accumulations in the sinking fund, with facility.

It was expected that the State would pay the interest upon all of her bonds paid into the sinking fund, whether they had been loaned to other railroad companies, or not; and it would be convenient to clip the coupons from the bonds, collect them, and re-invest the proceeds in other State bonds, to be held and used in the same way; and that system would probably have continued for many years, but for the fact that certain irregularities occurred in the offices of the Secretary of State, and of the Comptroller, which called the attention of the Legislature, to the danger of allowing such a large amount of uncancelled bonds to accumulate in the hands of the officers of the State, and caused the Legislature to examine the matter more critically; when they saw, as they would have seen at first, if they had thought of it sufficiently, that there was really no use in retaining any of the bonds uncancelled in the sinking fund; and accordingly, as will be hereafter shown, the law was changed so as to order the cancellation of all of such bonds.

On February 21, 1856, an act was passed, the fifth section of which is as follows: "Be it further enacted, that it shall be the duty of the several railroad companies in this State, who have re-

ceived, or may hereafter receive, bonds of the State, or the endorsement of their bonds by the State, to aid in the construction of their several roads, under the provisions of the Act of 1851–2, and the acts amendatory thereto, at the expiration of five years from the issuance or endorsement of their said several bonds, annually to set apart, and pay over to the Treasurer of the State, two per cent. per annum upon all bonds which have been, or may hereafter be, issued or endorsed, as aforesaid, as a sinking fund for the ultimate redemption of the bonds issued or endorsed as aforesaid; which sinking fund, when paid over, the Governor, Comptroller of the Treasury, and President of the Bank of Tennessee, shall invest in bonds of the State, and reinvest all accruing interest in like securities; and they are hereby constituted a Board of Commissioners for the management, government, and control of said sinking fund." (L. & N. Trans., 1866).

The sixth section is as follows: "Be it further enacted, that should any of said railroad companies fail or refuse to comply with the provisions of the fifth section of this act, it shall be the duty of the Governor, forthwith, to notify the Attorney-General of the district, in which is situated the place of business of said company, failing or refusing as aforesaid, of the fact; and thereupon the Attorney-General shall immediately proceed against said company, to collect said sinking fund, in the manner prescribed in the sixth section of an act entitled, An Act to establish a system of internal improvement in this State, passed February 11, 1852." (L. & N. Trans., 1867).

The sixth section of the Act of February 11, 1852, referred to in the sixth section of the Act of February 21, 1856, is as follows: "Be it further enacted, that if said company shall fail or refuse to pay any of said bonds when they fall due, it shall be the duty of the Governor, to notify the Attorney-General of the district, in which is situated the place of business of said company, of the fact, and thereupon said Attorney General shall forthwith file a bill against said company in the name of the State of Tennessee, in the Chancery or Circuit Court of the county in which is situated said place of business, setting forth the facts, and thereupon said court shall make all such orders and decrees in said cause, as may be deemed necessary by the court, to receive the payment of said bonds, with the interest thereon, and to indemnify the State of Ten-

nessee against any loss on account of the issuance of said bonds, by ordering the said railroad to be placed in the hands of a Receiver, ordering the sale of said road, and all the property and assets attached thereto, belonging to said company, or in such other manner as the court may deem best for the interest of the State." (L. & N. Trans., 1801).

It will be seen that instead of waiting until five years after the completion of the road, each company was required to commence the payments into the treasury of the State, five years after the issuance of the bonds to it; instead of paying one per cent. per annum, the company was required to pay two per cent.; and instead of allowing the company to purchase the bonds, they were to be purchased by the Board of Commissioners appointed by the State; instead of appointing a Receiver to sequestrate the rents, issues, and profits, the State reserved the right to have a "sale of said road, and all the property and assets attached thereto, or belonging to said company."

A calculation will show, that payments of two per cent. per annum, commenced five years after the issuance of the bonds, if invested in the purchase of State bonds, and if the interest accumulating thereon had been reinvested in like bonds, said payments, with their accumulations, would have paid off the debt from the company to the State, several years before maturity of the State bonds loaned to the company.

It will thus be seen that the defect in the Act of February 11, 1852, pointed out by our opponents, was remedied by the Legislature soon after its passage, and before any of the bonds sued on in these causes were issued.

Under the seventh section of the Act of February 11, 1852, the company was allowed to purchase the bonds which it was required to pay into the State treasury; and if it had supposed that the bonds borrowed by it were liens upon its road, it would, of course, as long as that act remained in force, have purchased them, if it could have found them, scattered as they were, and in the hands of persons who did not know for what purpose they had been issued.

Certain bonds issued by the East Tennessee & Georgia R. R. Co. were endorsed by the State under the Act of Feb. 4, 1848, and said company also borrowed bonds from the State under the Act of Feb. 11, 1852. Now, while that company was always careful to purchase

its own bonds which had been endorsed by the State, it never attempted to hunt up the bonds which had been loaned to it by the State; and for the simple reason that no one, at that day, supposed that the bonds borrowed by the company were a lien upon its road. (L. & N. Trans., 812). And though the Act of February 21, 1856, deprived the company of the right to select the bonds which were to be paid in to the State, and conferred that right upon the Board of Commissioners appointed by the State, said Commissioners pursued precisely the same course that had been previously pursued by the company. They never attempted to hunt up the bonds loaned to the company, but invested the money, paid in by the company, in any bonds of the State which the Commissioners happened to find; and this course of dealing in regard to the payments made by the railroad companies of Tennessee to the State, was continued as long as those payments were made.

I submit that the practical construction placed upon that feature of the law by the officers of the State, and by the railroad companies, is entitled to great consideration.

As there was no difference between the price of the bonds loaned to the companies, and the other bonds of the State, there was no money saved by purchasing non-railroad bonds, and therefore the conduct of the companies, and of the State officers, in purchasing such bonds, could not have been actuated by any improper motives.

It will be remembered that the bonds loaned by the State to the railroad companies, under the Act of February 11, 1852, were to be payable in not less than thirty, nor more than forty years.

Under the Act of February 21, 1856, the companies were required to commence making their partial payments into the treasury of the State, in five years after the issuance of the bonds, and if they failed or refused to make such payments, the Attorney General was to immediately proceed against them, to collect the amount due to the State, and if necessary, bills were to be filed to sell the roads.

Now, as all of the bonds sued on in these causes were issued after the Act of February 21, 1852, was passed, and were taken by the purchasers thereof, with full notice of the provisions of that act, they were bound to know that the State reserved the right to sell the roads if the companies failed to make the payments referred to; that such sales could be made immediately after the default of

the companies; and, therefore, that the sales might be made, twenty-five or thirty years before the bonds loaned to the companies fell due. Surely, in the event of such sales, the purchasers would have acquired absolute titles, free from all liens in favor of any person who purchased bonds issued after that act was passed.

As the statute contained no provision for making the bondholders parties to the suits for the sales of the roads, and as we cannot suppose that it was intended by the Legislature to deprive persons of valuable liens, without giving them notice of the proceedings in which it was to be done, we are bound to conclude that the Legislature did not believe that the bondholders had any lien upon the roads.

At the same session at which the Act of February 21, 1856, was passed, and only three days before its passage, the Act of February 18, 1856, was enacted, authorizing the loan of State bonds to the "State Agricultural Bureau," which, as I have heretofore said was a department of the State government. Of course no lien was reserved upon the property of such a Bureau, and yet we find in the act, the following provision, which was evidently copied, almost literally, from the seventh section of the Act of February 11, 1852. "At the end of five years after the purchase and completion of said buildings and fixtures, the said Bureau shall set apart one per centum per annum upon the amount of bonds issued to the Bureau, out of the gate and entry fees, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the Bureau shall pay into the Treasury of the State, after assigning them to the Governor, and for which the Governor shall give said Bureau a receipt; and as between the State and Bureau the bonds so paid in shall be a credit on the bonds issued to the Bureau, and bonds so paid in, and the interest accruing thereon from time to time, shall be held and used by the State as a sinking fund for the payment of the bonds issued to the Bureau; and should said Bureau repurchase any of the bonds issued to it under the provisions of this act, they shall be a credit as aforesaid and cancelled.' (L. & N. Trans., 1862). No one has ever pretended that the bonds loaned to the Agricultural Bureau, were a lien in favor of the holders thereof; no one has ever pretended that the partial payments or sinking fund provided for in that act were intended as an additional security for the holders of said bonds; and yet we find that the

bonds purchased with the monies paid in by said Bureau, were to be held and used by the State as a sinking fund, for the payment of the bonds issued to the Bureau. We find the same expression, that "the bonds so paid in, are to be a credit as between the State and the Bureau, on the bonds issued to the Bureau;" we find the same provision, that if the Bureau should repurchase any of the bonds issued to it, such bonds should be a credit as aforesaid, and cancelled; and we find the same omission to provide for the cancellation of any other bonds that might be paid in by the Bureau.

If our opponents can arrive at a satisfactory understanding of the sinking fund required by the State of the Agricultural Bureau, I think they will then have no further difficulty in understanding the sinking fund required of the railroad companies; I think they will find that they were both in effect and in language identical; and that both of them were intended, simply to sink the debts by a system of gradual partial payments.

XIII.

On March 20, 1860, an act was passed providing that the money or the bonds that had theretofore been paid by railroad companies, or that might thereafter be paid by them, should be passed directly to the credit of the companies paying the same, and be a release to said companies for that amount, on the debts due by them to the State of Tennessee; the bonds paid in were all to be cancelled by the commissioners.

If they were State bonds, they were to be cancelled by cutting out the names of the Governor and Secretary of State, and so defacing each coupon, that it could not, by any possibility, be used or circulated, and they were then to be filed in the office of the Secretary of State; if they were bonds of any railroad company endorsed by the State, they were to be cancelled in the same way, and were to be delivered to the company for whom they had been endorsed, taking the receipt of the President, or other officer of said company for the same; which receipt was to be filed, and a copy of it placed upon a book, which the commissioners were to keep for that purpose. The companies were required to pay two and a half per cent. per annum as a sinking fund, instead of two per cent., as had been required by the Act of February 21, 1856. The companies were permitted to pay it in cash, or in the like character of bonds,

that had been issued, or endorsed by the State for the company, and they were to the taken at their face, or par value. If the payments by the company were made in money, the commissioners were to invest it in bonds of the State, which were to be cancelled and filed as above stated, and such bonds were to be of the same character as those issued to the company. Section seven was as follows: "The sinking fund, when paid, in all cases shall be passed to the credit of said company or corporation, and be a release to said company or corporation for that amount due by them to the State. The commissioners shall issue a receipt to each company or corporation for such payment, retaining a duplicate in a well bound book, kept for that purpose."

The Comptroller was directed to keep a regular account against each company or corporation, charging it with the amount of bonds originally issued to, or endorsed for it by the State, and crediting it by the amount of sinking fund paid; and he was to furnish the Treasurer a statement of the amount due by each company or corporation, on the first of June and December of each year, in order that the Treasurer might know how much interest each of them had to pay; and each company or corporation was directed to provide the interest semi-annually, on the amount of bonds unpaid at the time said interest fell due, "and not on the original amount issued to, or endorsed by the State for said company," as theretofore provided. (L. & N. Trans., pp. 1903–1905).

It will be remembered that when said Act of March 20, 1860, was passed, there was not the slightest motive on the part of the State of Tennessee, or the railroad companies, to act unjustly towards the bondholders. Though the large amount of bonds loaned by the State to the railroad companies, amounting at that time to about $10,000,000, had depressed the price of Tennessee bonds, it was simply because the supply exceeded the demand, and not because any one doubted the ability or disposition of the State of Tennessee to meet her obligations. The railroad companies had promptly met all of their payments to the State, both of interest and sinking fund, and therefore the Act of March 20, 1860, must be regarded as an impartial practical construction of the internal improvement system, by the legislative department of the State of Tennessee, as well as by the railroad companies.

I have already stated, that one of the objects in passing the act of March 20, 1860, was to avoid the danger of allowing the accumulation of so large an amount of bonds in the hands of State officers. Another object was to avoid the useless ceremony, of one State officer cutting coupons from one set of State bonds, presenting them to the fiscal agent of the State for payment, and then reinvesting their proceeds in other bonds of the same State. It was discovered by that time, that it would be as easy to ascertain by a mere process of calculation, how much a thousand dollar bond, with six per cent. interest compounded semi-annually, would amount to in a given time, as it would be by having actual possession of the bond, and going through the actual process of reinvestment; and therefore, that the companies, in their accounts with the State, could be credited upon a proper basis, as well after the bonds were cancelled, as if they had been retained uncancelled, and their coupons had been paid by the State, and reinvested. It was not supposed that the bondholders would be injured, because, at that day, every one supposed that the lien belonged exclusively to the State.

Now, if our opponents are right in their theory, that the sinking funds were intended for the benefit and security of the holders of the bonds loaned to the railroad companies, will they explain why those holders stood by in 1860, and allowed the commissioners of the sinking funds to cancel all of the bonds that had been paid in to the sinking funds up to that time? Remember that the cancellation was to be done in such way, as that the bonds and coupons could not "by possibility, be used or circulated."

Five of the railroad companies now involved in this litigation had in the sinking funds, bonds to the amount of $109,750 as early as October, 1859; and these, with other bonds afterwards paid in, were practically destroyed, without one word of protest from the bondholders. (L. & N. Trans., 1898).

If our opponents are correct in their theory, the Act of March 20, 1860, was unconstitutional, inasmuch as it impaired the obligation of the alleged contract with the bondholders; and they could have enjoined the commissioners of the sinking funds from cancelling the bonds. They remained silent, however, and allowed the State and the railroad companies to continue in the belief, that the lien and sinking funds alike belonged to the State.

Again, the Act of February 11, 1852, required the companies to

pay an amount, sufficient to pay the interest upon all of the bonds that had been loaned to them respectively, and our opponents use that requirement as an evidence that the companies were to pay the interest to the bondholders; but the Act of March 20, 1860, directed that the companies should only be required to pay interest on the amount of bonds left unpaid after deducting their payments into the sinking fund; and enacted that they should not be required to pay upon the amount of bonds originally loaned to them. If our opponents are correct in their theory, this was another palpable impairment of the rights of the bondholders.

The bondholders should have demanded payment of their coupons from the railroad companies, notwithstanding the passage of such an unconstitutional statute; and if payment was refused, they should have taken the proper steps to have placed the roads in the hands of receivers; but they stood by for nineteen years after that statute was passed, without having ever presented a single coupon, to any railroad company of Tennessee for payment.

The failure of the bondholders to take any steps to test the constitutionality of the Act of March 20, 1860, amounts to a practical construction upon their part, to the effect that they had no right, to the sinking fund, nor to hold the companies liable for the interest upon the bonds.

Our opponents, feeling the force of the Act of March 20, 1860, have attempted to construe it, as having been intended to protect their interests. They say that it required the companies to pay the sinking fund either in cash, or in the like character of bonds that may have been issued, or endorsed by the State for said companies respectively; and they argue that by bonds of "like character," was meant, the same bonds that had been loaned to the companies respectively; forgetting that *similis non idem*.

At the time said statute was passed, the State had outstanding, several different series of bonds, issued under different laws, maturing at different times, and bearing different rates of interest. Some were five per cent. bonds; some were five and one-fourth per cent. bonds, and some were six per cent. bonds. (L. & N. Trans., p. 1033). By like "character of bonds," the State meant bonds bearing the same rate of interest, and maturing at the same time; and the object of the requirement was, to prevent the companies from purchasing bonds bearing a lower rate of interest, or having a longer

time to mature, than the bonds borrowed by them. The lower the rate of interest a bond carried, the less the companies would have to pay for it; and if the bonds purchased by them did not mature as soon as the bonds borrowed by them, the State would be forced to make earlier payment of that much of her bonded indebtedness.

Our opponents say, however, that this explanation cannot apply to the requirement in regard to the endorsed bonds. They say that a company, whose bonds had been endorsed by the State, was required to pay in bonds "of like character;" that no bonds could be of like character to those bonds, except bonds endorsed for that company; and that if no bonds could be of like character to bonds endorsed for a particular company, except the endorsed bonds themselves, no bonds could be of like character to bonds issued to a particular company, except the very bonds issued to that company.

The suggestion is ingerious, but unsound.

A bond issued by the Edgefield & Kentucky Railroad Company, is not of "like character" to a bond issued by the Nashville & Chattanooga Railroad Company, though both bonds may have been endorsed by the State, and though they may be alike in every other respect. The first named company is insolvent, while the latter is solvent. The latter ought not to be allowed to purchase the depreciated bonds of the former, to use in discharge of its own obligations; but all bonds issued by the State, if alike, in amount, maturity and interest, are of like character, whether issued for one purpose or another.

Our opponents refer to the fact, that the act of March 20, 1860, directs that if the endorsed bonds of any railroad company, shall be paid into the sinking fund, they shall be cancelled and delivered to said company; and that the effect of this might be, that the money paid in by one company, would be used in the purchase of bonds endorsed by another company, and those bonds would be paid over to the company for whom they were endorsed, although that company had not paid them in; thereby enabling that company to get credit for bonds, purchased with the funds of another company, leaving the bonds of the latter company outstanding, and unprovided for.

This is simply a misconception of the terms of the statute. The fifth section provides that a company may pay the sinking fund in

cash, or in the like character of bonds that may have been issued to, or endorsed by the State for said company. Of course, if the company concluded to pay, in endorsed bonds, it would pay, in its *own* endorsed bonds. It would not voluntarily pay, in the endorsed bonds of another company. If there were no endorsed bonds of its own outstanding, it would naturally (if they could be bought at a discount) pay, in State bonds, of like character to the bonds issued to it—meaning as before stated, "bonds of the same date, maturity, and rate of interest;" if, however, State bonds were at, or above par, the company would naturally pay the sinking fund in cash. When payment was made by a company in cash, the commissioners, by section six, were required to invest it in *bonds of the State.* They, the commissioners, were not authorized to invest the money of a company in any of the endorsed bonds, whether the bonds had been endorsed for that company or another; and therefore the injustice, which our opponents imagine might have resulted to a company whose bonds had been endorsed by the State, could not possibly arise in the practical execution of the statute.

XIV.

The sixth section of the Act of February 11, 1852, provides that if a company, to whom bonds were loaned, "shall fail or refuse to pay any of said bonds when they fall due, it shall be the duty of the Governor, to notify the Attorney-General of the District, in which is situated the place of business of said company, of the fact, and thereupon said Attorney-General shall forthwith file a bill against said company *in the name of the State,* in the Chancery or Circuit Court of the county in which is situated said place of business, setting forth the facts, and thereupon said court shall make all such orders and decrees in said cause, as may be deemed necessary *to receive the payment of said bonds with the interest, and to indemnify the State of Tennessee against any loss on account of the issuance of said bonds,* by ordering the said railroad to be placed in the hands of a receiver, *ordering the sale of said road and all the property and assets attached thereto, or belonging to said company,* or in such other manner as the court may deem best for the interest of the State." (L. & N. Trans., p. 1801).

Section fourteen of said Act provides, "that in the event any of the roads, fixtures or property, belonging to any of said companies

shall be sold under the provisions of this act, it shall be the duty of the Governor to appoint an agent *for the State*, who shall attend said sale, and protect *the interest of the State*, and shall, if necessary to protect *said interest, buy in said road or property in the name of the State*, and in case said agent shall purchase said road *for the State*, the Governor shall appoint a receiver, who shall take possession of said road, and use the same as provided for in the fifth section of this act, and said receiver shall settle with the Comptroller semi-annually until the next meeting of the General Assembly." (L. & N. Trans., p. 1805).

Our opponents contend that the legal proceedings contemplated by the sections just quoted, were to be instituted in the name of the State as Trustee for the bondholders; that the proceeds of the sale were to be paid to the bondholders, and not to the State, and that the receiver was to be appointed, and was to operate the road for the benefit of the bondholders. The objections to that theory are:

First. There is nothing in said sections, nor in any other part of the act, declaring any trust in favor of the bondholders, or declaring the State to be a Trustee for any one.

Second. The bill is to be filed "in the name of the *State;*" the decree is "to indemnify the *State;*" the road is to be sold, or placed in the hands of a receiver, as the Court "may deem for the interest of the *State;*" the agent to attend the sale is to be an "agent for the *State;* he is directed "to protect the interest of the *State;*" and he is to buy in the road in the name of the *State.*" While the interest and indemnity of the *State* are mentioned in almost every sentence, the interest of the bondholders is no where referred to in the statute.

Third. Though it may be true that a trustee, vested with the power to collect a trust fund, and to distribute it among the beneficiaries, may, as the representative of the beneficiaries, file a bill in his own name, without making them parties to the suit; yet, a mere naked trustee, having nothing but the legal title, having no power to collect, or to distribute the fund after it is collected, cannot file a bill in his own name to collect and distribute the fund among the beneficiaries, without making such beneficiaries parties to the suit; and it is manifest that the sixth section does not contemplate that the bondholders shall be made parties, either as complainants or de-

fendants, to the proceedings therein directed to be taken in the name of the State.

Fourth. The theory of our opponents necessarily involves the idea that the Legislature of 1852 expected that the State would allow her bonds to go to default, and remain in default until they could be collected by legal proceedings from the company; whereas, the State had never, up to that time, been in default upon either the interest or principal of any of her obligations.

Our contention is, that the sale was to be, not only in the name of the State, but that it was to be made to indemnify and protect the State, against "any loss on account of the issuance of the bonds loaned to the company."

It was feared that owing to the devastation of war, or other unusual causes, the partial payments made by a company, under the sinking fund requirement, might possibly not amount to as much as the bonds loaned to the Company, by the time those bonds matured; it was expected that the State would, of course, promptly pay the bonds at maturity to the holders; and then she would file a bill to sell the road, for her own "indemnity." If a purchaser could be found at a satisfactory price, the road would be sold to him, and the purchase money would be paid to the State, to indemnify her for what she had paid on the bonds; but if such a purchaser could not be found, then the State's agent would buy in the road for the State, and the Governor would appoint a receiver, to manage the road until the next meeting of the Legislature, when the final disposition of it would be decided upon.

Our opponents, however, suggest that the fourteenth section directs that the receiver appointed after the contemplated sale, should take possession of the road, and run it as provided for in the fifth section of the Act; and that the fifth section directs that the receiver shall pay over the rents, issues and profits under the direction of the Governor, towards the liquidation of the unpaid interest; which interest they insist is to be paid by the receiver to the bondholders.

It is a sufficient reply to this suggestion to say, that the sale contemplated by the sixth and fourteenth sections, quoted above, was not to be made until after the bonds fell due, and therefore it could not have been expected that the earnings of the road under the management of the receiver, appointed after the sale, should be applied to the payment of current interest.

It will be noticed that the fourteenth section does not direct the receiver, appointed after the sale, to use the rents, issues, and profits in the payment of either the interest, or principal of the bonds; it simply says, that he shall take possession of the road and use it (the road) as provided for in the fifth section; but says nothing as to what he shall do with the earnings, except that he shall settle with the Comptroller semi-annually until the next meeting of the General Assembly; and it will be remembered, that the fifth section directs that the balances, found in his hands upon such settlements, shall be deposited in the Treasury of the State. Whether the receiver was appointed before the sale, under the fifth section, or after the sale, under the fourteenth section, he was to settle his accounts with the Comptroller and pay the balances into the Treasury. Under the fifth section, those balances were to be appropriated under the direction of the Governor in liquidation of the unpaid interest due to the State from the company; but under the fourteenth section, the moneys paid by the receiver into the Treasury, were to remain there, until they were disposed of at the next session of the Legislature.

XV.

Section twelve of the Act of February 11, 1852, is as follows: "That the State of Tennessee expressly reserves the right to enact, by the Legislature thereof hereafter, *all such laws as may be deemed necessary to protect the interest of the State, and to secure the State against any loss* in consequence of the issuance of bonds, under the provisions of this act, but in such manner as not to impair the vested rights of the *stockholders*." (L. & N. Trans., p. 1804).

The fourth section of the Act of January 15, 1852, authorizing the loan of "bridge bonds" to the East Tennessee & Virginia Railroad Company, is as follows: "That the Legislature of this State shall have power to enact any law or laws, *that may hereafter be deemed necessary to protect the interest or credit of the State, against loss or damage on account of the issuance of said bonds*, and to provide for the *more speedy* and certain payment by the company of said bonds and interest, not impairing the vested rights of the *stockholders*." (L. & N. Trans., p. 1741).

The acts from which I have just quoted, were passed at the same session, and may be regarded as twin sisters; though the verbiage

may differ somewhat, it is manifest that the two sections mean substantially the same thing.

Our opponents contend that the State of Tennessee, being an equitable surety upon the bonds, and Trustee of the lien created by said acts, its interest was identical with the interest of the bondholders; that it was to the interest of the State that the companies should pay the bonds to the holders thereof, and thereby indemnify the State; and that the object of said section was to secure that interest of the State, as equitable surety, and Trustee.

We contend that the State of Tennessee was the creditor, and mortgagee of the railroad companies, for the bonds loaned to them respectively; and that the object of said section, was to protect the interest of the State as such creditor, and mortgagee, against any loss, in consequence of the issuance of said bonds.

Our opponents base their entire claim upon the theory, that the actual intention of the Legislature of 1852, was to secure the payment of the bonds by the companies, to the holders thereof. According to their theory, there were three parties to the contract proposed to be made by those acts, viz: The State; the railroad companies; and the bondholders. The companies were to be the debtors; the bondholders were to be the creditors; and the State was to be the trustee and equitable surety. And yet, strange to say, though the Act of January 15th contains nine sections, and the Act of February 11th contains twenty sections, the bondholders, who were to be the parties most interested in the contract, are never mentioned in either of the acts.

Such a contract would have been the first tripartite contract ever drawn, in which one of the contracting parties was not mentioned at all, and that party the most important one in the contract.

We say that the bondholders were not mentioned in either of those acts, because the lien created by the acts, was intended for the exclusive benefit of the State, and the only debt due from the companies, was due to the State; that the bondholders were not interested in the provisions of either of the acts, and therefore were not mentioned in them.

But conceding, for the sake of argument, that our opponents contention is correct; that the State was surety for the companies, and that the companies were debtors to the bondholders; yet the interest of the State, as such surety, cannot be said to have been

strictly identical with that of the bondholders. It is true that both the State and the bondholders would, under that theory, be interested in having the bonds paid to the holders by the companies; and to that extent, the interest of the State and the bondholders would be identical; but their interest might not be identical, by any means, as to the enforcement of the lien created by those acts.

If the State of Tennessee had continued to maintain the good faith which she had always displayed up to the time those acts were passed, and if she had continued, as she then was, amply able to meet all of her liabilities, whether as principal or surety, the bondholders would have felt very little interest in the enforcement of the lien; in fact, their whole explanation as to why they funded the interest upon their bonds that matured during, and after the late war, in new bonds of the State, instead of demanding payment from the railroad companies, is, that they generously confided in the honor of the State, and did not desire to oppress the companies.

While it suited the purpose of the bondholders, to look to the State as surety, it was very important to the State, to reserve the right to enforce the lien, which was retained to secure payment by the companies. However sanguine all parties may have been as to the future success of the railroad system then inaugurated, it occurred to them, that their expectations might not be fully realized; and that war, or other calamity might overtake them, as it did, and impair the value of the roads to such an extent, that they would furnish inadequate security for the obligations, which the companies were to assume.

Under that state of facts, the bondholders, relying implicitly upon the faith and credit of the State, and feeling but little concern in the enforcement of the lien, agreed that the State, through its Legislature, should have power to enact all such laws as might be deemed necessary to protect the interest of the State as surety, and to secure the State against any loss in consequence of the issuance of the bonds; and among other measures, that the State might provide for the more "speedy and certain payment" by the companies of the bonds and interest.

Now, I think that I have stated fairly, the nature of the agreement into which the bondholders claim to have entered, when they purchased the bonds issued under said statute; and will any one say that such an agreement on their part, was contrary to public policy,

or that it was oppressive, or unjust towards them, or that it was, for any other reason invalid?

If I have stated the nature of their agreement correctly; and if they concede its validity, I am sure that none of the companies represented by me, have ever violated the agreement; nor has the State of Tennessee violated it, in any of the legislation under which those companies have acted, in discharging the obligations assumed by them in the agreement.

I shall not contend that the power reserved to the State, by the sections last quoted, was an absolute or despotic power. I shall concede that it was a power, which, though very broad and far-reaching, was nevertheless limited by honesty and good faith. I shall concede that the State had no power, under the reservation, to maliciously or wantonly impair the rights of any one; and that the legislation which it reserved the power to enact, was to be such legislation as might reasonably be regarded as necessary to protect the interests of the State. I shall undertake to show, that the legislation which was enacted, was of that character; and for the purposes of that part of my argument it will be immaterial whether the State is to be regarded as the creditor, or the surety of the companies.

XVI.

In order to determine whether the legislation of the State of Tennessee, under which the railroad companies have paid off their debts contracted under the Acts of 1851–2, was passed by the State in good faith to protect her interest, either as creditor or surety, it is necessary to understand the circumstances by which the State was surrounded when that legislation was passed.

With the exception of one, all the railroad companies of Tennessee paid their interest to the State up to and including January 1, 1861.

Upon the occupation of the State by the United States forces, the railroads, with but two exceptions, were seized by the general government, and were operated by it for military purposes until the war closed. (L. & N. Trans., 1059, 1368, 1372).

None of the companies paid any interest, or made any payments, into the sinking fund, during the war. L. & N. Trans., 1375). Most of the roads were unfinished when the war began, and all of

them were greatly damaged by the contending armies during the war; sometimes they were in the possession of one army, and sometimes in the possession of the other; and whenever either army was forced to abandon possession of a road, it invariably damaged it as much as possible, in order to prevent it being used by the other.

At the close of the war, the aggregate indebtedness of the State of Tennessee was $20,005,606, of which $366,166 had ma ured during the war, and had to be provided for at once. The property of the private citizens of the State had been greatly damaged by the war, and the people felt that they were unable to stand a high rate of taxation.

The condition of the railroads of Tennessee at that time, is exemplified by the Memphis, Clarksville & Louisville Railroad, as to which it is stipulated by counsel as follows: "That company having defaulted on its interest, the Governor placed it in the hands of a Receiver as early as July 1, 1865; and though it was continued under State Receivers until it was sold, it never paid one cent into the treasury on any account whatever. The easterly span of the Cumberland river bridge, and the whole of the bridge over the Tennessee river, had been destroyed during the war; some of the trestling had been swept away, some of it had been thrown out of position, and all of it, that was standing, needed extensive repairs. One of the most frightful railway accidents of modern times occurred on that road in consequence of a passenger train running through a trestle. The dirt embankments had been badly washed, and the cuts filled up with mud, in some instances ten feet deep. Many parts of the road were overgrown with grass, weeds, and briars. The farmers along the road, being in need of iron during the war, had taken rods, bolts, spikes, and chairs for blacksmithing purposes, and had even cut the bridges and trestles to get the iron. Switch circles, targets, and connecting rods were taken off and used for the same purposes.

This railroad is about eighty-two miles long. The termini are both small villages, of no commercial importance, and the country traversed is poor and sparsely settled. The road crosses three large rivers, and numerous small streams, requiring many bridges and trestles. The cost of construction, and maintenance of way, is enormous, while the local business of the road is almost nothi g. *To have kept such a road in operation through a receiver, until the*

State bonds loaned to it matured, would have cost the State many millions of dollars. To have allowed it to remain unused, would have been equivalent to abandoning it to waste and destruction; and as to the company keeping it up, they were utterly insolvent, and as early as March 28, 1867, initiated proceedings to go into voluntary bankruptcy, for which purpose they afterwards filed a petition in the United States District Court at Nashville." (L. & N. Trans. pp. 1048–5).

On April 6, 1865, Gov. Brownlow, in his message, called the attention of the Legislature to the Louisville & Nashville Railroad Company in this language: "It is your duty to let that company know, in decided but respectful terms, what your rights are, and that you dare assert and maintain them them." (L. & N. Trans., p. 1371). That company had refused to pay its interest or sinking fund, giving as a reason, the fact that the State of Tennessee had, by its troops, seized and held the road, and destroyed its bridges and trestles. (L & N. Trans., p. 1372). On May 6, 1865, the Legislature appointed the Comptroller, Secretary of State, Attorney-General, and Commissioner of Public Roads, a committee on behalf of the State, to make a settlement with said company; and if such settlement could not be made by said committee, they were to report the fact to the Governor, *and he was to direct the Attorney General of the State to institute such proceedings against the company as might be necessary to protect the interests of the State.* (L. & N. Trans., p. 69).

As said company had failed to pay its interest to the State, its road was liable to be placed in the hands of a State receiver, under the fifth section of the Act of February 11, 1852; and as said company had failed to make its payments into the sinking fund, its road was liable to be sold under the provisions of the sixth and seventh sections of the Act of February 11, 1852, and the sixth section of the Act of February 21, 1856. (L. & N. Trans., p. 1800).

Rather than have its road imperiled, the company concluded to settle with the State; and on November 17, 1865, it paid to said committee $707,631.21 in bonds and coupons of the State of Tennessee, being the total indebtedness of said company to the State on account of the bonds borrowed by it from the State. The committee, in their report to the Legislature, say: "*Believing it to be manifesely for the interest of the State* to call in this large install-

ment of its indebtedness, *and believing, moreover, that the company had a right under the law regulating the sinking fund, to pay off its entire indebtedness in the bonds of the State,* your commissioners accepted the proposal," &c.

If the State of Tennessee acted in good faith in making that settlement, believing it to be to her interest, considering the large amount of her outstanding indebtedness, to receive pay from that company of the whole amount of the company's indebtedness, in the bonds and coupons of the State, did she not have the right to do so under the power reserved to pass such laws as might be necessary to protect her interests? Whether we regard her as a creditor or as a surety, was it not to her interest to reduce the amount of her own indebtedness, to a point that would enable her to pay the holders of the bonds issued to that company; and if such legislation, instead of accomplishing that purpose, has, contrary to the expectation of every one, resulted in depriving the holders of those bonds of a lien upon that road, which they supposed they were entitled to, is it not a legitimate consequence of their own agreement, that the State should have the right to pass such laws as it deemed necessary to protect its interest?

Now I concede that if the settlement was made in bad faith—if the State intended to receive its depreciated bonds as a matter of favor to the company, and then repudiate the bonds loaned to the company, it would not fall fairly within the power which the State had reserved; but, no one will pretend that in 1865, when Mr. Brownlow, who is so often quoted by our opponents, was Governor of the State, it had ever been contemplated by any one to act unjustly towards the bondholders of the State. Even our opponents do not intimate that any such feeling existed in that State, until four or five years afterwards. Doubtless there was not a single holder of Tennessee bonds at that time, who did not heartily approve that settlement—for, although the bondholders did not, at that time, suppose they had any lien upon the road, they thought that the action of the State as the creditor of the road, was wise in accepting its own bonds in payment of the debt.

That I am right as to the approval of the bondholders of the settlement, is shown by the fact, that five days after it was reported to the Legislature, to wit: on November 23, 1865, an act was passed, instructing the Governor to issue the bonds of the State,

similar in character to the bonds which had been issued under the Act of February 11, 1852, to an amount sufficient to pay off all the bonds, and interest then past due, as well as that to fall due January 1, 1866, or any bonds that might fall due during the year 1867, (L. & N. Trans., p. 1923); and every holder of the bonds of the State of Tennessee funded his past due coupons into the new bonds authorized to be issued under that act. (L. & N. Trans., p. 1041).

In funding their bonds, no attempt was made, to preserve the evidence by which the new bonds could be traced back to the bonds, from which the coupons had been detached; and new bonds might have been issued for coupons on bonds loaned to several different railroad companies, or on bonds not loaned to any railroad company.

In March, 1865, the bonds of the State were quoted at about fifty cents on the dollar, while the Louisville & Nashville Railroad Company was known to be entirely solvent. (L. & N. Trans., p. 1061). The unpaid coupons upon the bonds loaned to that company amounted, at the date of the settlement, to $147,131, and the holders of those coupons, instead of demanding payment of them from a solvent company, funded them into State bonds, which had been quoted as low as fifty cents on the dollar, within the then current year. Certainly this conduct was a practical construction by the holders of those coupons, either to the effect that they had no lien upon the road, or that the State, as surety upon said coupons, had acted wisely in allowing the company to pay off its indebtedness in other bonds and coupons of the State, thereby enabling the State to protect her credit, and increase her means for meeting her liabilities.

The wisdom of the State in thus reducing the amount of her indebtedness, and in funding her bonds that were then past due, is shown by the fact that the market price of her bonds in the city of New York, rose from fifty cents on the dollar in March, 1865, to ninety-two cents on the dollar in December of the same year. If the State, the bondholders, and the company, were all of the opinion in 1865, that the settlement was one that would protect the interest and credit of the State, are not the bondholders bound by the legislation under which the settlement was made, notwithstanding subseqnent events may have caused the State to repudiate

the bonds, which, it was then hoped, the settlement would enable her the better to pay.

The State having loaned to the railroad companies about $10,000,000 before the war, undertook, after the war, to aid them in the reconstruction and re-equipment of their roads, rather than lose what she had already loaned to them. In execution of this policy, several statutes were passed authorizing the loan of additional bonds to various railroad companies, retaining the same lien for the security of the new bonds, that had been retained to secure the bonds that had been issued under the Acts of 1851–2. Although the effect of such legislation, was to nearly double the amount of bonds loaned to the companies, the holders of the bonds issued before the war made no complaint, and took no steps to prevent the issuance of the new bonds, which were to share in the benefit of the lien, which our opponents now insist was reserved for the benefit of the holders of the bonds, issued under the acts passed before the war. This, I submit, was a practical construction, by the holders of the bonds loaned before the war, to the effect that their bonds were not liens upon the roads.

By an Act passed December 7, 1867, among other loans of bonds to railroad companies, was one to the Nashville & Decatur Railroad Company for $350,000, and the fifteenth section of the act provided, "that if the several railroad companies; or either of them, to whom the bonds of the State have been loaned by this act, or *former* acts, should fail, for two consecutive years, to pay the interest that may accrue upon the bonds loaned to them respectively, then, and in that case, the Governor, Secretary of State, and Comptroller may, at their discretion, sell said railroad track, railings, and rolling stock, &c., upon such terms and conditions as they may deem best to secure the interest of the State; and shall retain of the proceeds of said sale, the amounts loaned to said companies, and the interest due on the same, with expenses of said sale." (L. & N. Trans., pp. 1946–7).

Notwitstanding the additional loans made to them by the State after the war, the railroad companies were unable, owing to the disturbed condition of that section of the country, to earn enough to pay their interest and sinking fund to the State. On the first of July, 1867, there was due from the railroad companies to the State, $800,000, for interest unpaid, (L. & N. Trans., p. 1942); and in his

message to the Legislature of October 8, 1867, Governor Brownlow states that he had placed as many as seven roads in the hands of receivers; and that if the other companies did not pay the interest on their indebtedness to the State promptly, he would also appoint receivers for them. (L. & N. Trans., pp. 1936–7).

In his message of November 10, 1868, Governor Brownlow reported that the indebtedness of the railroad companies to the State, on account of unpaid interest, had increased to $1,120,996; and he expressed the opinion, that the interest of the roads, as well as that of the State, required *that they should be sold, and the proceeds thereof applied to the reduction of the State debt.* He said that he would have placed two other roads in the hands of receivers, for failure to pay the July interest, but that he had learned by experience, that to do so, would only entail increased burdens upon the State Treasury. (L. & N. Trans., p. 1973). And the Comptroller, in his report of October 1, 1867, stated that from the roads then in the hands of receivers, scarcely a dollar had been received during the past fiscal year. At that time, the railroad companies owed the State $23,601,000, exclusive of matured and unpaid interest. (L. & N. Trans., p. 1938).

Such being the circumstances surrounding the State at the time, an Act was passed February 25, 1869, "to liquidate the State debt contracted in aid of railroad companies in the State of Tennessee." After reciting that the State had loaned its bonds to various railroad companies, to secure which the State held a first mortgage, or lien, on the franchises, property and fixtures of the respective companies, and that it was "desirable, for the welfare of the State," that the State should be reimbursed such amounts as had been advanced to the different railroad companies, as fast as it might be practicable, it was enacted, that the respective companies should be authorized to repay any amount of the principal and interest of such indebtedness, as they had respectively created, in the bonds of the State, in such manner, and at such times, as might be practicable. Said companies were authorized to issue their own bonds, of equal amount and denomination, as the bonds of the State delivered up for cancellation; and said company bonds, so issued in lieu of any equal amount of State bonds, should be certified to by the Comptroller, and should be a lien, *pro rata* in amount, and of equal validity and effect, with the unretired part of the State indebtedness

upon such railroad, and all its property, franchises, &c. (L. & N. Trans., pp. 1977–8).

On January 20, 1870, said act was amended, so as to allow the companies to pay in, to the State, in liquidation of the principal of their indebtedness, any of the legally issued six per cent. bonds of the State outstanding, without regard to series or numbers, and such payments were, to the extent made, to be a full, and fair discharge, of the liens, which the State held upon the property of such companies, whether the bonds paid in, should be the same bonds, or the same series of bonds, loaned to the companies, respectively, or not. (L. & N. Trans., 1995).

On July 1, 1870, the Nashville & Decatur Railroad Company executed a mortgage upon its road, etc., to secure $2,100,000 of first mortgage bonds. Said bonds were sold, and with the proceeds, bonds of the State were purchased, to the amount of $2,368,176, which, in March, 1871, were paid to the State of Tennessee, in full discharge of the debt and lien of the State upon said road.

On May 25, 1871, the Memphis & Ohio Railroad Company paid the State of Tennessee $2,468,376, in bonds and coupons of the State, in full of all claims and demands of said State against said company, and in full discharge and satisfaction of all liens upon the property, rights, franchises, and privileges of said company, originating in, or created by, the loan, or issuance and delivery to said company, of the bonds of the State under the Act of February 11, 1852, and its amendments. (L. & N. Trans., 1041, 1846).

Said company had borrowed the money, with which the State bonds were purchased, and on June 1, 1871, executed a mortgage upon its road, property, rights, etc., to secure certain company bonds, the proceeds of which were used to replace the money borrowed.

The Nashville & Decatur Railroad Company failed to pay its interest to the State, due July 1, 1869, and was in arrears several years, on its payments to the sinking fund.

Under the Acts of February 21, 1856, and December 7, 1867, the State had the right to have the road sold, either by bill in equity, as provided by the sixth section of the Act of February 21, 1856, or by the Governor, Secretary of State, and Comptroller, as provided by the fifteenth section of the Act of December 7, 1867.

The Memphis & Ohio Railroad Company failed to pay its interest to the State due July 1, 1867, and the Governor appointed a receiver

to take charge of the road. The earnings were insufficient to pay operating expenses; and additional means were needed to put the road in a safe condition. (L. & N. Trans., 1046).

Now, whether we regard the State as a creditor, or a surety of said companies, can any one doubt the wisdom of the State, in allowing them to pay off their debts, in bonds and coupons of the State? If that course had not been pursued, both roads would have been placed in the hands of receivers; and experience had shown that such receivers had invariably run the roads down, and allowed the interest to accumulate.

It is stipulated by counsel, that if the State had forced a sale of all the delinquent railroads, so large an amount of said property, thrown upon the market in the depressed financial condition of the country, would have sacrificed alike the interest of the companies and the State; and that by allowing them to pay their debts in any of the bonds of the State, and by giving them a reasonable time within which to get the bonds, the companies were enabled to procure them at reasonable rates, and by reducing the aggregate debt of the State, they increased the ability of the State to pay, so that the bonds of the State, which were quoted as low as forty and a half cents in December, 1869, were quoted as high as ninety-one and three-quarter cents on the dollar, in March, 1874, at the New York Stock Exchange. (L. & N. Trans., 1044, 1045).

Regarding the State as a mere surety for the companies, if she had stood by until the bonds loaned to those companies matured, the roads would have been utterly worthless, and would have brought little or nothing, either for the State or the bondholders; and though the bondholders may have been willing to look to the State, yet the State had the right to protect her interest as surety; and if she believed, in good faith, that she could best protect that interest by reducing her indebtedness nearly $5,000,000, by allowing those companies to pay her, in her own bonds, I submit, with confidence, that the bondholders cannot object to the statutes under which those payments were authorized, inasmuch as they agreed, when they purchased the bonds, that the State should have the right to pass all such laws, as she deemed necessary to protect her interest and credit. No one can read this record, without being thoroughly satisfied that the holders of the bonds of the State of Tennessee

looked approvingly upon the legislation under which those two payments were made, for, as I have just stated, it had the effect to greatly appreciate the value of all the bonds of the State.

XVIII.

Some of the railroad companies of Tennessee were unable to procure the bonds of the State to pay their indebtedness to the State, and on July 1, 1870, an act was passed, authorizing the sale and transfer of the interest of the State in such delinquent companies. After reciting the provision contained in the Act of December 7, 1867, authorizing the Governor, Secretary of State, and Comptroller, in their discretion, upon the failure of any of the railroad companies, for two consecutive years, to pay the interest that might accrue upon their bonds, to sell the railroads, etc., upon such terms and conditions as they might deem best to secure the interest of the State, it further recites, that the time had arrived when it was necessary to protect the interest of the State, to secure the State from loss in consequence of the issuance of bonds to said companies, that a sale should be made of the interest of the State in each of said companies; that it was important to relieve the people of the burden then upon them, and, by wise legislation, endeavor to restore the public credit, which could be done by a proper enforcement of the legal rights of the State of Tennessee, as against said companies. The act appointed the Governor, Secretary of State, and Comptroller, together with three of the most distinguished lawyers of the State, Commissioners to sell the interest of the State, in all of said companies, and authorized them to receive the purchase money in any of the legally issued bonds of the State; but the condition was imposed, that the sales should not be made, unless the roads sold for a sum, equal to the amount of the debts due from the companies to the State. (L. & N. Trans., 2003–2005). The Commissioners reported to the Legislature that they had been unable to effect any sales; that various embarrassing questions had arisen exclusively of a judicial nature, and that no sale could be made until those questions were settled, and among them was the question as to whether the lien reserved by the Acts of 1851–2 belonged to the State, or to the bondholders; for, until that question was settled it was impossible to know what was the interest of the State. (L.

& N. Trans., 2013, 2021). Thereupon, the Legislature passed the Act of December 21, 1870, directing that a bill should be filed in the Chancery Court at Nashville, in the name and behalf of the State, to which all the delinquent companies, the respective stockholders, holders of the bonds, creditors, and all persons interested in the said several roads, should be made parties defendants, and should be brought before the Court in the mode prescribed by the rules of practice in Chancery, established in the State, except as otherwise provided in the Act. Said Court was vested with the exclusive jurisdiction to hear, adjudicate, and determine all questions of law, and matters of controversy, of whatever nature, whether of law or fact, that had arisen, or might thereafter arise, touching the rights or interests of the State, and also of the stockholders, bondholders, and others, in said roads; and to make all such rules, orders and decrees as might be deemed necessary in order to a final and proper adjustment of the rights of all parties, preliminary to a sale of the interest of the State in said roads; and, also, to declare the exact amount of indebtedness of each of said companies to the State, and likewise to define, as might be thought proper, what should be the rights, duties and liabilities of the purchaser of the State's interest in said roads or either of them, and what should be the reserved rights of said companies, stockholders and others respectively, as against said purchasers, after such sale, under the existing laws of the State. A specific value was to be fixed upon the State's interest in each of said roads, by a decree of the Court, and the commissioners were to be authorized to dispose of the same, at such value; and if a sale of any of the roads could not be made at such value, the same was to be sold for the highest price that could be obtained. Upon the sale of any of the franchises, of any of the railroad companies, by the commissioners, under the provisions of said Act, all the rights, privileges, and immunities pertaining to the franchises so sold, under its act of incorporation, and amendments thereto, were to be transferred to and vest in such purchaser. (L. & N. Trans., 2021–2027).

In January, 1871, the State of Tennessee filed a bill in said court, against various delinquent railroad companies, and among them, the Memphis, Clarksville & Louisville Railroad Company, upon which such proceedings were had, that a sale of said road, and of the State's interest therein, was made; and the Louisville & Nashville Railroad Company became the purchaser thereof.

Now, whether we regard the State as the creditor, or the surety of the Memphis, Clarksville & Louisville Railroad Company, I think there can be no question as to the good faith of the State, in passing the legislation, under which the sale took place. I have already shown the dilapidated condition of that road; that the appointment of a receiver would have been worse than useless; that the company itself was unable to operate the road; that its physical condition was such as to render it unsafe as a thoroughfare, and that it was constantly growing worse. By the time the bonds loaned to that company would have matured, the road would have been worthless, either to the State, or the bondholders. The State knew that her bonds were outstanding, and that the holders of them would look to her for payment. She offered first to sell her interest as creditor, and mortgagee. She found, for the first time, that her rights as such were questioned; and that the suggestion had been made, that the lien, which she had always thought was hers, belonged to the bondholders. She thereupon agreed to waive her sovereignty, and notified the bondholders, and every one else interested in the roads, to appear before a court of competent jurisdiction, to have all matters of controversy settled. That court decided that the lien belonged to the State, and not to the bondholders, and ordered the road to be sold.

Could any course of conduct have been more fair, or honorable towards the bondholders, than that pursued by the State of Tennessee? Is there anything to indicate that the State was not, in good faith, endeavoring "to protect her interest and credit from loss, on account of the issuance of the bonds" to that company; and if she was acting in good faith, did she not have the right to pass the laws referred to, under the power which she reserved in the Acts of 1851–2, and to which reservation, the bondholders consented, when they purchased their bonds?

XIX.

Various objections have been made by our opponents to the decree of sale of the Memphis, Clarksville & Louisville Railroad above referred to:

First. It is said that the law of December 21, 1870, is unconstitutional, because it is a partial law, and not the law of the land; that it undertakes to confer jurisdiction upon the court to try one

particular cause, or one set of causes, between certain specified litigants, without its jurisdiction applying to the community at large.

It is a sufficient reply to say, that the jurisdiction applied to all of the delinquent railroad companies in the State, and to all persons who had any interest in said companies, or in the litigation contemplated under the Act. Its scope was as broad and general as it was possible to make it under the circumstances.

Second. It is said that the Act directed the bill to be filed in the Chancery Court, at Nashville, when some of the railroad companies had no office or place of business there; and when the general law required bills in equity to be filed in the counties where the defendants reside.

My reply is, that such an objection could only have been made, by such of the companies, as had no office or place of business at Nashville, and if such companies saw proper to submit to the jurisdiction of the court, no one else has any right to complain.

Third. It is said that the act provided for a special term of the court, thus showing a sort of favoritism to the State.

A sufficient answer to this is, that no one applied to have the proceedings continued to the next general term of the court; and if all the parties saw proper to submit to the exercise of the jurisdiction of the court, at the special term, persons who did not see proper to appear, have no right to complain.

Fourth. It is said the act limits the right of appeal, or writ of error, to thirty days from the date of the final decree; whereas, other litigants under the general law, are allowed a much longer time in which to prosecute revisory proceedings. As no one applied for an appeal, or writ of error, after thirty days from the final decree, and as every one submitted to the decree, it will be unnecessary to discuss this objection,

Fifth. It is said that the act directed numerous defendants to be joined, and required them to litigate various questions, which, under the general chancery practice, would have rendered the bill demurrable, for misjoinder, and multifariousness.

The reply is, that the appellants in these causes, did not see proper to present the objection by demurrer, in that cause; and as every one who appeared in the cause, waived the objection, it is now too late to raise it.

All of the objections just referred to, I think, fall clearly within

the principle settled by this court, in U. S. *v.* U. P. R. R., 98 U. S., 608, in which it was held, that the Legislature may constitutionally provide a specific method of procedure, which by removing restrictions on the jurisdiction, process, and pleading in ordinary cases, will give a larger scope for the action of the court, and a more economical and efficient remedy, than before existed, provided there be no intention to change the substantial rights of the parties.

Sixth. It is said that the bill filed by the State, does not sufficiently show, that any relief was prayed against the holders of the bonds, loaned to the Memphis, Clarksville & Louisville Railroad Company. The bill is filed against certain *designated* railroad companies, and "against the respective stockholders of those companies; *the holders of the bonds issued by the State to those companies;* the holders of bonds issued by any of those companies, the creditors of said companies; and all other persons interested in said several roads or companies, whose names and residences are unknown, except as follows," etc. The bill then proceeds to set forth, at considerable length, the acts of the Legislature under which the bonds of the State were loaned to the different railroad companies; the amount of the bonds originally loaned by the State to each of the companies, and the amount due from each of the companies to the State, for principal, interest, and sinking fund. It refers to the fact, that additional aid was granted to the defendant companies, subsequent to the aid granted by the Act of February 11, 1852, and charges that such additional aid was received by the companies, upon the condition, that the State should have the same lien for the new bonds, as for the bonds first issued; that such additional aid was received by said companies, with the full knowledge and assent of the stockholders of the several companies, *and of the holders of bonds previously issued by the State to said companies.*

The State claimed to have acquired, by virtue of the several acts under which said bonds were issued, a statutory lien or mortgage, upon the entire road of said several companies, including the stock, right of way, etc., *prior and superior to all other liens whatsoever, and whensoever created.* The bill insists, "*that the State has the right to demand a sale, of all of the property and effects, rights, privileges, and franchises of said several companies; the proceeds of sale to be applied, first to the extinguishment of the debt due to*

the State, with interest, and cost." It claimed "priority of satisfaction for the State out of the incomes or sales of said roads, for the whole of the indebtedness of said companies, over all other creditors, or claimants of said roads, of every nature and kind whatsoever." It prayed "that all of the respective stockhoders of said companies, *the holders of State bonds issued to said companies,* the holders of bonds of the said companies, issued by them, and secured by liens, pledges, or mortgages of said roads, or any part thereof, or of their property or franchises, and all creditors of said railroad companies, and all persons interested in said roads, be made defendants by service of process on those named, and by publication as to those whose names and residences were unknown; *that all such rules, orders, and decrees be made, as might be deemed necessary, in order to a final adjustment of the rights of all the parties,* preliminary to the sale of the interest of the State in said road; *also to declare the exact amount of indebtedness, of each of said companies to the State, and to define as might be thought proper what should be the rights, duties, and liabilities of the purchasers of the State's interest in said roads, or either of them, and what should be the reserved rights of said companies, stockholders, bondholders and others, respectively, against said purchasers after such sale, under the existing laws.* (L. & N. Trans., 2227–2254).

I think no one can read the bill, without seeing at a glance, that the State claimed the exclusive benefit of the lien, reserved by the Acts of 1851–2; that it denied the rights of the State bondholders to that lien, and that one of the incidental, or preliminary objects of the bill, was, to have the question settled, as to whether said lien belonged to the State, or to the State bondholders.

Seventh. It is said that the State bondholders were not legally brought before the court, by publication; and for that reason are not bound by the decree. The Code of Tennessee provides as follows:

Section 4352. "Personal service of process on the defendant in the Court of Chancery, is dispensed with in the following cases * * * * 4th. "When the *name* of the defendant is unknown, and cannot be ascertained upon diligent inquiry."

5th. "When the *residence* of the defendant is unknown, and cannot be ascertained upon diligent inquiry."

Section 4358. "When the suit is against an unknown defendant, the order of publication should describe such unknown party, *as*

near as may be, by the character in which he is sued, and by reference to his title, or interest in the subject matter of the litigation."

The bill stated, upon affidavit, in due form, that the names and residences of all the "holders of the bonds issued by the State to said companies were unknown," except the names of certain designated persons. (L. & N. Trans., 2227–8).

The affidavit of Hon. W. B. Reese, one of the solicitors for the State in that cause, states, that he made diligent inquiry, and search, to ascertain the names of the holders of the State bonds, and particularly of the bonds of the Memphis, Clarksville & Louisville and the Northwestern, Railroad Companies; and that after making all the inquiry he had the time or means to make, he was unable to find the names of any such bondholders, other than as stated in the bill. (L. & N. Trans., p. 2278).

In the amended bill it is alleged "that your orator, after diligent inquiry, has not found any of the holders of the State bonds, issued to any of the delinquent railroads, except Dempsey Weaver, of Davidson county, Tennessee, who is the holder of one of the bonds issued to the Edgefield & Kentucky Railroad Company, one of the bonds issued to the Memphis, Clarksville & Louisville Railroad Company, and one issued to the Nashville & Northwestern Railroad Company. (L. & N. Trans., p. 2286).

It will be seen that the counsel for the State used due diligence, to ascertain the names of the State bondholders, but was unable to do so, with the one exception just referred to. Very few of the bondholders lived in Tennessee, and the counsel had no means of ascertaining the names or residences of those who lived abroad.

The order of publication, after specifying the Memphis, Clarksville & Louisville Railroad Company, and the other delinquent companies, states, that it appeared from the allegations of the original and amended bills, *that the names and residences of a number of the holders of the bonds issued by the complainant, the State of Tennessee, to the before named railroad companies,* were unknown, although diligent inquiry had been made to ascertain the same; and it orders, *that all of said holders of bonds, issued by the State to said companies* enter their appearance, &c., &c.

It will be seen that both in the original and amended bills, and in the order of publication, the State bondholders are described "as near as may be, by the character in which they were sued,"

viz: as "the holders of the bonds issued by the complainant, the State of Tennessee, to the before-named railroad companies;" and that they are sued "in reference to their title or interest," as such bondholders.

No more minute description of them could possibly have been given, unless they had been described as the "holders of certain numbers of the bonds of the State of Tennessee (specifying the numbers), which bonds had been loaned to said railroad companies." This, I concede, would have been a more accurate description; but neither the statute, nor the general law requires any such minute description. Every one who held a bond of the State of Tennessee, that had been loaned to either of those railroad companies, had fair notice that he had been made a party to that suit. If he did not know whether his bonds had been issued to any of those companies, he could have ascertained it, by looking to the numbers on his bonds and comparing them with the Comptroller's reports. If he did not feel enough interest in the question, to compare the numbers on his bonds, with the Comptroller's report, he would not have compared them with the numbers, specified in the order of publication.

The bill was filed by the State in good faith, to settle a question which the interest of all the parties demanded should be settled. The bondholders were as much interested as the State, in the settlement of the question. They failed or refused to initiate any proceedings themselves, by which the question could be settled; and nothing was left, except for the State to attempt to settle it by a suit brought in her name, against the bondholders, and the other creditors of the company.

After using due diligence to ascertain their names and residences, the State found one of the bondholders, and he came forward, and submitted the question to the jurisdiction of the court.

As to the other bondholders, whose names and residences could not be ascertained, publication was duly made in such manner, as that it would naturally have have attracted the attention, of any person who held State bonds, loaned to either of the companies named in the bill; but they failed or refused to appear. Surely, the jurisdiction of the court ought not to be defeated upon mere technical grounds, where it can be seen that the State was honestly endeavoring to get the bondholders before the court, so as to have the questions at issue, fairly, and finally settled.

XXI.

I understand this Court to have decided, in the case of Pennoyer *vs.* Neff, 95 U. S., 727:

First. That where the defendant is a non-resident, and the suit is merely *in personam*, to obtain a judgment or decree, against him, to be enforced, by an ordinary execution, against his general estate, publication alone is insufficient to give jurisdiction; and a judgement obtained in such a suit, upon mere publication, is void.

Second. That where the object of the suit, is to obtain a judgment, or decree against a non-resident, and to subject to its satisfaction, certain specific property of the defendant, situated within the jurisdiction of the court, publication for the defendant to appear, will not give the court jurisdiction, unless the property be attached or otherwise brought under the control of the court.

Third. That where, in such a suit, publication is made for the defendant, and his property is also attached, though the judgment will have no effect, beyond the property attached in that suit, yet it will be effectual to subject *that* property; and a sale under the judgment will pass the defendant's title.

Fourth. That where the *entire* object of the action, *is to determine the personal rights, and obligations of the defendant,* that is, *where the suit is merely in personam,* constructive service, by publication, upon a non resident is ineffectual.

Fifth: But that such constructive service may be sufficient, in cases, "where the object of the action, is to *reach, or dispose of property in the State, or of some interest therein, by enforcing a contract, or a lien respecting the same,* or to partition it among different owners, or when the public is a party, to condemn and appropriate it for a public purpose. *In other words, such service may be sufficient, in all actions which are substantially proceedings in rem.*"

The object of the bill filed by the State, was not to ask any personal decree against the bondholders; "neither was the *entire* object" of the suit, "to determine the personal rights, and obligations" of the bondholders; the *main* object of the suit was "*to enforce a contract, or a lien,* respecting" a railroad, and "*to reach and dispose of*" the road, to satisfy the lien.

The Memphis, Clarksville & Louisville Railroad Company, the owner of the road, was duly served with personal process; the road was situated exclusively within the jurisdiction of the Court; and

though there was no attachment of the road, the mere *lis pendens* gave the Court sufficient control of the property, to authorize it to protect it from trespassers, to decree a sale of it, and to put the purchaser in possession.

So far from the "determination of the personal rights, and liabilities" of the bondholders, being the "*entire* object" of the suit, it was a mere incident to the main object, which was to enforce the lien of the State, by a sale of the road.

In order to obtain a fair price for the property, it was important, that the rights of the bondholders, and of all other claimants, should be determined; and they were brought before the Court, merely to accomplish that preliminary purpose.

There was no ground for an attachment of the road. The company was a resident of the State; and it could not be charged that the company had absconded, or fradulently disposed of its property, or that it had done any thing else that would render it amenable to the attachment laws of Tennessee. The road could not be attached as the property of the bondholders, because they were not the owners of it; at most, they claimed a mere lien upon it. Besides, the State held no debt against the bondholders, and therefore could not have attached the road, even if it had belonged to them. If then, the actual attachment, or seizure of the road was essential to the jurisdiction of the Court, it was utterly impossible for the Court to acquire jurisdiction; and the road must have gone to absolute ruin, because no power existed anywhere, to settle the preliminary, and incidental questions, that embarrassed the sale of the property.

XXII.

It has never seemed to me, that the Louisville & Nashville Railroad Company, as purchaser of the Memphis, Clarksville & Louisville Railroad, was forced to rely, upon the validity of the decree of the Chancery Court at Nashville, as *res adjudicata* against the bondholders; because the Act of December 7, 1867, expressly provided, that if the several railroad companies, to whom bonds of the State were loaned by that act, or *former* acts, should fail for two consecutive years, to pay the interest that might accrue, upon the bonds loaned to them severally, the Governor, Secretary of State, and Comptroller, might *sell their roads, upon such terms and conditions* as

they might deem best, to secure the interest of the State; and that they should retain out of the proceeds of said sale, the amounts loaned to said companies, and the interest due on the same, with expenses of sale.

The Governor, Secretary of State, and Comptroller, were three of the Commissioners appointed by the Chancery Court to make the sale; and whether the decree was, of itself alone, sufficient, the Act of December 7, 1867, certainly was.

The Commissioners under that act, being authorized to sell upon "such terms and conditions as they deemed best," saw proper to sell for bonds of the State; and the State saw proper to receive those bonds, in payment of its debt, against the companies.

If that act be constitutional, and I see no reason why it is not, it seems to me, to be conclusive of the controversy, so far as the Memphis, Clarksville, and Louisville Railroad is concerned. (L. & N. Trans., 1946).

XXIII.

The appellants do not come before this Court, with any very meritorious claim. The record shows that they, in common with the other bondholders of Tennessee, not only remained silent, when the legislation of 1869–70 was being carried into execution, under which the railroad companies of Tennessee, discharged their debts to the State; but it is in evidence that some, if not all, of them, approved, if they did not instigate the action of the State. They reaped the benefit, of a material enhancement of the market value of their bonds, which resulted from the reduction, made in the State debt of Tennessee, by the payments of the railroad companies; and many of the bonds now in controversy, have been procured by them, through a process of buying large blocks of Tennessee bonds on the stock exchange, and after selecting out, by their numbers, the bonds loaned to the defendant railroad companies, selling the balance back upon the exchange, at the same price, they paid for them. This looks too much like stirring up litigation, to merit the favorable consideration of the Court.

Ed. Baxter
of counsel for
Appellees

APPENDIX.

CHAPTER CX.

AN ACT to incorporate the Dyersburg and Mississippi River Turnpike and Plank Road Company.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That Thomas J. Connell, James Fields, William P. Foulks and Thomas Finley, of the county of Dyer, are hereby authorized, as commissioners, to open books at such time and places as they may think proper, for the purpose of receiving subscriptions to the amount of sixty thousand dollars, or less if sufficient, to be applied to the making of a plank or turnpike road from Dyersburg to the Mississippi river, which sum shall be divided into shares of fifty dollars each. Said commissioners shall meet at Dyersburg on the first Monday in May, for the purpose of opening books for the subscription of stock, and so soon as five thousand dollars of said amount of stock shall be subscribed, they may call a meeting of the stockholders, for the purpose of organizing said company, and the stockholders shall proceed to elect from their body five directors, and in voting for said directors, each shareholder shall be entitled to one vote for each share. And the directors when elected, shall elect from their own body a president, and such other officers as may be necessary, for the term of two years, and until their successors are elected and qualified, which said directors and stockholders are hereby created a body politic and corporate, by the name and style of the Dyersburg and Mississippi River Turnpike and Plank Road Company, and by that name may sue and be sued, plead and be impleaded, and shall have and enjoy all the rights and privileges appertaining to bodies corporate and politic, and shall have suc-

cession ninety-nine years, the style of said road, and number of gates, shall be the same as that described in the 24th section of the charter of the Lexington and Clifton Turnpike Company, except the width, which shall be made wider or narrower at the discretion of the directors of said road; the route to be laid off by said directors, and all damages, if any, to be paid by said company. The tolls to be under the directions of said president and board of directors of said company.

SEC. 2. *Be it further enacted*, That this company shall be governed, and have the same privileges as are conferred by the 4th, 8th, 9th, 10th, 12th and 14th sections of an act, entitled "an act to incorporate the Western Central Turnpike Company," passed, December 21st, 1849.

SEC. 3. *Be it further enacted*, That this company shall have the right to bridge or ferry the Obion river where said road crosses the same.

SEC. 4. *Be it further enacted*, That when said company shall be fully organized, they may call upon the Governor of this State, and it shall be his duty to issue the bonds of the State of Tennessee to the president and directors of said company, to the amount of twenty-five thousand dollars, payable in thirty years or less, as the president and directors may determine, bearing interest at six per cent. per annum, upon the following conditions: That said company shall notify the Governor, sixty days before making such application, and he shall authorize the circuit court judge of that district to appoint a commissioner on the part of the State, and he shall proceed to value and assess the value of such real estate as may be pointed out to him by the company, to the amount of forty thousand dollars, and he shall investigate the titles to said real estate, and then make his report to said judge, and said circuit judge shall proceed to take a lien or mortgage upon such real estate, and the amount of stock subscribed, together with the road, gates, tolls and fixtures of said corporation, in behalf of the State of Tennessee, as security for the payment of the above named bonds of the State.

SEC. 5. *Be it further enacted*, That said company may increase said capital stock to one hundred thousand dollars, and continue said road to the town of Trenton, in the county of Gibson, and that they may have three years to construct said road after the passage of this act.

SEC. 6. *Be it further enacted*, That said company shall pay the interest on said bonds semi-annually, on the first day of January and July, in each and every year, into the Treasury of the State of Tennessee, and upon failure to do so by said company, the district attorney, for said district, shall appoint a receiver, and take said road, gates and fixtures into possession, together with the books, mortgages, &c., and proceed to dispose of the same, or enough thereof to pay said interest and cost, &c.

JORDAN STOKES,
Speaker of the House of Representatives,
M. R. HILL,
Speaker of the Senate.

Passed, February 5, 1852.

Nos. 43. 44 + 45

114-662

Supreme Court of the United States.

Calvin Amory Stevens et al.,

APPELLANTS,

— versus —

The Louisville & Nashville Railroad Company et al.,

APPELLEES.

Argument of Wm. M. Ramsey on Behalf of John B. Smith, Trustee.

1884:
Press of GEO. R. TOPP, Law Printer,
CINCINNATI, OHIO.

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The Tennessee railroads, upon which that State at one time held a statutory lien, are not the railroads upon which the complainants seek to establish a lien. Or, if they are, they are but technically, not actually, the same. The roadbeds no doubt remain substantially the same as to location, and a lien created before the war, if not cancelled in some way, might still attach, for that reason, but in every practical, business, or commercial sense, the present roads, with some exceptions, are new, and were built and equipped with

money invested in the full beleif that the lien alleged by the complainants did not exist.

I have the honor to represent the trustees of mortgage deeds, securing several millions of dollars of the funds which were obtained and used in re-building and equipping the Memphis & Ohio, the Memphis, Clarksville & Louisville, and Louisville & Nashville Railroads. The nature and amount of these securities are shown in the several answers and cross-bills of John B. Smith, trustee.

As against the holders of these securities, the complainants certainly have no natural equity, whatever may be the result of an examination of the technical claim which they present. The fund which built these roads was not contributed by complainants, but by the persons whom I represent.

The record clearly shows that neither the legislature of Tennessee nor the railroad companies receiving State aid, nor the purchasers of State bonds in the market, had any thought that the holders of those bonds were to be invested with any interest in the statutory lien of the State, at the date of the passage of the law in question, or at any time in the twenty years next succeeding its passage. It shows, on the contrary, that during all of this period, all concerned acted upon the contrary assumption.

Under all of these circumstances, the Court would be astute to discover just grounds upon which to defeat so inequitable a claim, if astuteness were required.

Without further preliminary remark, I beg to submit the following considerations upon

The Construction of the Act of February 11th, 1852, and its Amendments.

The examination of these statutes should be made in the light of the language of the Chief Justice in delivering the opinion of this Court in *R. R. vs. Schulte*, 103 U. S., (at page 140), to-wit:

"And here it is proper to say that contracts created by, or entered into under, the authority of statutes, are to be interpreted according to the language used in each particular case to express the obligation assumed. Where the State is concerned, the words employed are sometimes to be taken most strongly against the other party, but in this, as in other cases of contracts, language is to be given, if possible, its usual and ordinary meaning. The object is to find out from the words used what the parties intended to do. Every statute, like every contract, must be read by itself, and it no more follows that one statutory contract is like another than that one ordinary contract means what another does. Of course, general rules of construction may and should be called into use when required, and sometimes, when certain words used in statutes are understood to have a certain meaning, the same words will be given the same meaning in other like cases; still, in the end, it must be determined from the language used in each particular case what has been done, or agreed to be done, in that case. We have been thus careful to state these familiar principles in this connection to guard against the use of this case as authority in others where the contract, even though it be created by or under the authority of a statute, is not the same."

The Act of Feb. 11th, 1852, conferred upon the State of Tennessee a lien for her sole benefit, and this is manifest from that which the act contains, and that which it otherwise would have contained.

Whatever may be the strict legal definition of the relationship between the State and the railroad company borrowing its bonds, it cannot, in any just sense, be said to be a

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The Act of Feb. 11th, 1852, conferred upon the State of Tennessee a lien for her sole benefit, and this is manifest from that which the act contains, and that which it otherwise would have contained.

Whatever may be the strict legal definition of the relationship between the State and the railroad company borrowing its bonds, it cannot, in any just sense, be said to be a

loan for the accommodation of the railroad company. It was purely a business transaction between the State and the company, each party being moved thereto by expected benefits and advantages. There were but two parties to the transaction,—the State and the company. In the very nature of things, considering the character of the parties, and the objects in view, there would be but two parties. And, from the beginning to the end of the act in question, and in all the acts which, from time to time, were passed by way of amendment to it, there is not any mention of any third person, or class of persons, as having any interest, either actual or possible, in the things to be done in pursuance of its provisions, or any of them.

The object of the State was to secure the construction of railways, to the end that the material prosperity of the people might be promoted. To accomplish this, she was willing to issue her bonds, and to undertake their payment, according to their tenor and effect. She took the obligation of the company to indemnify her, well knowing that the value of that obligation depended largely upon the result of the enterprise. She was willing to incur this hazard for the sake of the benefit certain to accrue to her.

The railroad company wanted money at a low rate of interest, and with ample time in which to repay it, and it accepted the proposition of the State, as affording an advantageous method of obtaining it.

The transaction itself, although not defined, in terms, in the Act of Feb. 11, is styled a "loan" of bonds in that of Feb. 21, (Record, p. 15). But it was really, when executed in one of the modes authorized by the statute, but a loan of money,—*a loan of the proceeds of the bonds.*

This conclusion is established by reference to the second section of the Act of Feb. 11th.

This section provides:

1st. That the bonds issued to the company shall be used only for certain purposes.

2nd. That the governor should have power to appoint a commissioner to act in conjunction with the president of the railroad company, "in negotiating said bonds, *for the purposes aforesaid.*"

We have here the assumption of power by the State to assist in the sale of the bonds in the money market, and to direct and control the application of the proceeds. The purpose of the statute would be accomplished, in strict accordance with its terms, by the delivery of the bonds to the State Commissioner, who would notify the president that he held them, and ask him to assist in their negotiation, and who, upon the sale, would receive and retain the proceeds, and disburse the same in payment for rails, spikes, etc. In no other way could the purpose of the appointment of the commissioner be accomplished. If the bonds could be misappropriated by the president, acting alone, it would not guard against such misappropriation, to merely appoint a commissioner whose duty would be finished when the bonds were sold. The application of the proceeds was the very thing to which he was to give his official attention. By the acceptance of the proffered aid, the railroad company agreed to the appointment of this commissioner, and to the power conferred upon him.

The railroad company could not be said to have borrowed a bond while it was yet in the hands of an agent of the len-

der, for the purpose of sale to third persons. If the State's Commissioner, being thus in possession of the bonds, for sale, should embezzle them, or their proceeds, no one would think the railroad company liable to the State, or to any one upon them.

It is not necessary that I should establish that the State's Commissioner should retain the proceeds of the sale of the bonds, and invest them for the company. It is shown to be a loan of money when it is made to appear that he retains the bonds until sold and delivered to the first purchaser. The thing which the railroad company then receives is the money arising from the sale.

If this construction be correct, it tends to establish that construction of the entire act which declares the obligation of the railroad company to be to repay the State the amount loaned to it, whether the loan be in the form of bonds or money, for it is plain that the obligation of the company is to make that re-payment in but one mode, whether the advance be made to it in money, or in bonds.

Assuming, however, that no commissioner was appointed in any of the instances under consideration, and that the bonds themselves were delivered directly to the company, as they might have been, it was then a "loan" of bonds as it is called in the statute. In fact, all of the bonds were issued directly to the companies.

In support of the general proposition that the bondholders had no interest in this lien, attention is called to the following aspects of the act:

1st. *There is no express reference to the bondholders.*

The bonds were to be issued to the company (Sec. 1). The governor might appoint a commissioner to act in any matter "pertaining to said company, when the *interest of the State* might require it" (Sec. 2). The State was to be invested with the lien (Sec. 3). No lien was to be permitted to conflict with that of the State (Sec. 4). Upon failure to pay into the treasury of the State's fiscal agent, an amount equal to the amount of maturing interest, fifteen days before the State would be obliged to pay her creditors, the governor is to appoint a receiver (Sec. 5). Upon failure to pay said bonds, at maturity, the governor is to file a bill in which the State is to be sole complainant, and the railroad company the sole defendant (Sec. 6). And the Court is to make all such orders as may be necessary "to indemnify the State of Tennessee, as the Court may deem best for the interest of *the State.*" The State is authorized to receive one per centum per annum upon the amount of the bonds, and credit the amount to the company (Sec. 7). The president is to report to the governor, and the governor to the legislature, "for its action" (Sec 8). Then follows the sweeping clause which gives the right to the State to enact such laws as may be necessary to protect its interests (Sec. 12). The remaining sections need not be referred to; they are of the same general tenor. They regard the State, and the State alone, as being interested in the lien. It is incredible that a statute so comprehensive as this one, dealing with such a subject, and intending to give the security of this lien to the holders of the State bonds, would omit all reference to them, either direct or indirect. Let it be supposed that the legislature intended to give credit to these bonds by giving to the

holder a lien upon the road. Would not the fact of the existence of such lien be proclaimed in unmistakable terms, together with the provision of ample means, or at least, of some means, by which the bondholders could make it effective?

And, yet, there is here not only no reference to the bondholders, but a constant reference to the "interests of the State," as being the only thing in contemplation, so far as the security, and any and all modes of its enforcement, are concerned.

The Florida Act, which this Court had under consideration in *R. R. vs. Schulte*, 103 U. S., expressly declared the State to be a "trustee for the bondholders." In the South Carolina instance, the bond was the bond of the railroad company, indorsed by the State.

2nd. The failure of the Act of February 11th, to provide any means by which any bond could be identified as having been issued to any particular company, is of very great significance, as showing that neither party to the transaction had thought of investing the bondholders with any interest in the security. And, although provision was subsequently made, to-wit: by the Act of February 21, for registration, it was a provision merely for record in a book to be kept in the office of the comptroller alone, and no means were provided for making its contents public. This record was plainly designed for the use of the State, in keeping its accounts with the several companies, and for no other purpose. Even after the passage of this amendment, it remained true of the bonds in question, as it was of the bonds under consideration in *Tompkins vs. R. R. Co.*, 18 Fed. Rep., 353, as said by MR. JUSTICE MILLER:

"No indorsement whatever is made on the bonds of the State; no reference to any security held by the State, is found in the bonds on which this suit is brought, nor in the negotiation of their sale."

The record shows that, in the sale of the bonds, no notice was taken of the lien, and all bonds of the State sold for a uniform price.

3rd. An examination of the whole statute only confirms the foregoing general view of it:

The first nine sections of the act, in the first instance, expressly apply only to a particular railroad company—the East Tennessee and Virginia Railroad Company; but its provisions are extended by section 10, so as to embrace the other companies named.

Section 1 of the act provides for an issue, by the governor to the company, of coupon bonds of the State of Tennessee, to an amount not exceeding eight thousand dollars per mile, payable at such place as the president of the company might designate, bearing interest at the rate of six per centum per annum, payable semi-annually, and not having more than forty nor less than thirty years to mature; but on *certain conditions* only.

These conditions are:

1. That the company shall have previously procured *bona fide* subscriptions for its capital stock, to an amount sufficient to grade, bridge, and prepare for the iron rails *the whole extent of the main trunk line* proposed to be constructed by said company, to be shown by the company to the governor to be *good and solvent.*

2. That the company shall have graded, bridged, and shall have ready to put down the necessary timbers for the

reception of rails, and fully prepared, *a section of thirty miles* of said road, at either terminus, in a good and substantial manner, with good materials, for putting on the iron rails and equipments, of which the governor shall be notified in the manner required.

3. That the governor shall also, in like manner be notified that said section, in whole or in part, *is not subject to any lien whatever*, other than those created in favor of the State by the acts of 1851–2.

4. That the amount of bonds to be issued shall not exceed $8,000 per mile on said section.

Section 2 provides:

1. That said bonds shall not be issued by the company for any other purpose than for procuring the iron rails, chairs, spikes, and equipments for said section of said road, and for putting down said rails.

2. That the governor shall not issue the same, unless, upon the affidavit of the president and a resolution of a majority of the board of directors, that said bonds shall not be used for any other than the purpose specified.

3. That the governor shall have power to appoint a commissioner to act under oath, in conjunction with the president of the company in negotiating said bonds for the purpose aforesaid, and to act in any other matter pertaining to said company when the interest of the State, in the opinion of the governor, may require it.

Section 3 is as follows:

"That so soon as the bonds of the State shall have been issued for the first section of the road, as aforesaid, *they shall constitute a lien upon said section so prepared as aforesaid*, including the road-bed, right of way, grading,

bridges, and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes, and equipments, when purchased and delivered, and the *State of Tennessee*, upon the issuance of said bonds and by virtue of the same, *shall be invested* with said lien or mortgage without a deed from the company, *for the payment by said company of said bonds, with the interest thereon as the same becomes due.*"

Section 4, makes provision for the extension of the lien to successive sections of the road, until its final completion. For each additional section of twenty miles, connecting with a section completed, and ready for the iron, the governor, on notice as before, shall, in like manner, issue to the company like bonds of the State of Tennessee, to an equal amount for each section, on the same terms and conditions, and:

"Upon the issuance of the said bonds, the State of Tennessee shall be invested with a like mortgage or lien without a deed from said company, upon said stock, and upon said first and additional section or sections of said road so prepared, upon the rails and equipments put or to be put upon the same, for the payment of said bonds and the accruing interest thereon,"

With a proviso authorizing porportional issues of bonds for fractional sections less than twenty miles long, and for roads less than thirty miles in extent.

"And, when the whole of said road shall be completed, the State of Tennessee shall be invested with a lien, without a deed from the company, upon the entire road, including the stock, etc., . . . *for the payment of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds.* And, after the governor shall have issued bonds for the first section of the road, it shall not be lawful for said company to give, create, or convey to any person or persons or body corporate whatever any lien, incumbrance, or mortgage of any kind, which shall have priority over or come in conflict with the lien of

the State herein secured; and any such lien, incumbrance, or mortgage shall be null and void as against said lien or mortgage of the State, and the said lien or mortgage of the State shall have priority over all other claims existing or to exist against said company."

These sections are treated by the argument in support of the complainants' view as definitely, fully, and completely descriptive of the nature, character, objects, and extent of the lien, without reference to other provisions of the law, and, indeed, as governing in the construction of all other provisions.

It is accordingly argued, that as this lien is declared expressly to be "for the payment by said company of said bonds, with the interest thereon as the same becomes due," that it can not be discharged otherwise, except with the consent of the holders of the bonds, to secure the payment of which, principal and interest, is declared to be the purpose for which it was reserved. It is said that the obligation, imposed by these terms, upon the railroad company is to pay the principal and interest of the very bonds loaned and issued to it, and by it negotiated to others, and not other bonds loaned and issued to other companies and by them negotiated; and that, as the obligation is to pay these bonds specifically, the payments *ex vi termini* are to be made to the holder for the time being of the bonds, which the company is bound to pay; that this creates an interest in the performance of the obligation in the holder, to whom the performance must be made, and makes him its beneficiary; and that the security, reserved to the State and in its name, is therefore to be held by it, in trust for his benefit.

And it is claimed and argued, as a consequence, that a

direct action would lie in favor of the holder of any such bonds against the railroad company to whom they were issued and by whom they were negotiated, to recover for any default in payment of interest or principal, as subject to a corporate liability; and a direct suit in equity would exist in favor of such party, to enforce the lien, by subjecting the property on which it is charged to sequestration and sale, for the satisfaction of such a debt; and that the bondholders, having these rights vested in them, by having become party to the contract arising upon the terms of the law, by acceptance of the bonds, negotiated under them, are protected against any subsequent action of the other parties, and any subsequent legislation by the State, by the provision of the constitution of the United States and of the State of Tennessee, which prohibits and makes void any law of the State, imparing the obligation of a contract.

It is claimed that the result and operation of these provisions of law, was to establish a certain legal relation, by which the State of Tennessee, nominally the principal debtor, to the holder of its internal improvement bonds, became surety in fact, for the railroad company, the real and primary debtor, and the security reserved to the State, in its own name, was equally for the benefit of the purchaser of the bonds, who was creditor of both, the lien established by the law being security for him, and one of the conditions of his contract.

The opposing view is at least equally consistent with the language of these sections of the law. That view is that the reservation of the lien by the State upon the railroad, although for the purpose of securing the payment of the principal and interest on the bonds loaned to the

company, was for its own exclusive use and benefit, and constituted a contract between the railroad company and the State alone, to which the purchaser of the bonds was neither party or privy, whereby the railroad company agreed, in consideration of the loan of the bonds to it, that as between it and the State the railroad company, and not the State, should pay the interest and principal of the bonds loaned to and negotiated by it, and agreed to secure the performance of its obligation by the pledge of its property. Under this view, there was one relation between the State and the holder of its bonds, of debtor and creditor, arising upon the terms of the bonds themselves, being a contract for the payment of the money promised upon the pledge of the faith and credit of the State. Another separate, distinct, and altogether independent relation was established between the State and the railroad company, whereby the latter, having become debtor to the State for its bonds borrowed for its use, agreed that it would pay according to the tenor of the bonds what the State had engaged to pay, so as to relieve it entirely, not from its obligation, but from the performance of the obligation, and to secure this exoneration consented to the reservation of the statutory lien, correctly expressed to be for the payment of the bonds, principal and interest, loaned to it by the State, *because that was the obligation of the State, against which the indemnity was provided.* But this transaction was between it and the State, alone, in which no one else had or was intended to have any legal or equitable interest, much less any direct participation and right of intervention or control.

The relation between the railroad company and the holder of the State bonds, originally issued to and negotiated

by it. was that merely of vendor and purchaser of negotiable securities, in open market, passing by delivery merely, without liability upon any contract of indorsement. There was no relation between them, of debtor and creditor. The purchase of the bond was not a loan of money; it was simply the sale of a chose in action. The relation it created was not a continuing one; it began and ended with a single dealing, and created no rights except as a transfer of title.

The transaction must be carefully, at the outset, distinguished from another and different one, with which, however, it is sought to confound it. That other would exist, if the railroad company, instead of negotiating and selling the bonds of the State, in the manner stated, had negotiated and sold its own bonds, indorsed or guaranteed by the State, the payment of which, principal and interest, had been secured by a statutory mortgage, reserved in the law authorizing their issue, indorsement or guarantee, and sale. In that case, there would plainly be a connected and direct relation between three parties, all participating in the identical transaction, the transaction itself being a unit, not divisible into parts. In that case, there would be a relation of debtor and creditor, the State and railroad company being jointly bound, as surety and principal, and the bondholder entitled to look to both, and directly interested in the security of the pledge, as made expressly for the performance of the direct obligation of the railroad company to him, as well as to the State. If, as supposed, this pledge was one of the terms of the original contract, to which all were parties, there might be reasonable ground for a claim that it was a trust established for the benefit of the creditor, of which he could not be deprived without his consent.

If there had been no lien reserved or mortgage given, what then, would have been the relative obligation of the parties? As between the State and the purchaser of its bonds, there would have been no change of rights or duties. As between the railroad company and the holder of State bonds, bought from it, unquestionably there would be no recourse, upon the mere contract of sale, fully executed. As between the railroad company and the State, the former would, by implication of law, be bound to protect the latter against loss in consequence of the loan, and by virtue of the loan, would become a debtor to the State, to pay to the State such sums of money, and at such times, as would relieve the State from the necessity of providing means for the payments it was bound to make to its bondholders and creditors.

But, upon that supposition, there is no privity between the creditors of the State and the railroad company; and the former would not be in a situation, by judicial process, to recover against the latter, for the amounts accruing to them, upon the State bonds. How is the situation altered in its legal aspects, by the mere circumstance, that the railroad company gives to the State a mortgage lien to secure the performance of its obligation to the State?

We maintain that the view which excludes the holder of State bonds from any legal or equitable interest in the lien reserved by these sections is, quite as consistent, to say the least, with the terms of the reservation, as the opposite view, which includes him, as equally, with the State, a beneficiary under it, with rights fixed and vested by contract.

The circumstances to be noticed, as establishing that consistency, may be enumerated as follows:

1. The lien according to the terms of its reservation,

arises, before there is or can be any holder of the State bonds, by purchase from the railroad company; that is, it arises immediately upon the issue of the bonds to the railroad company, and before their sale by it. The language of the statute is, that the governor *shall issue* to the company, the bonds authorized (section 1), and "that *so soon* as the bonds of the State *shall have been issued*," etc., they shall constitute a lien, etc. At its inception, then, there are no parties to share it with the State. The State alone can have any advantage of it. The transaction between the State and the railroad company becomes final and complete by that single act. The State has loaned its bonds to the railroad company; and the borrower, by implication of law, becomes indebted to the State, *to return them or such equivalent or substitute as they may otherwise or thereafter agree upon.*

It is true that the transaction contemplates a negotiation and sale of the borrowed bonds to purchasers for money; but the rights of the State and the debt of the railroad company to it, do not wait for that, and are not dependent upon it. They begin at once, and what they are defined to be in their origin, they remain and continue to be, without change, unless changed by contract of these parties.

2. No provision is made for any new rights to arise, upon the negotiation and sale of the borrowed bonds. Particularly no stipulation is expressly in words made, for any benefit to accrue to the purchaser of the bonds, *except such as enures to him, from the very instruments which he has purchased.* He has bought what appears to be a naked, unconditional obligation of the State. It rests in its own terms upon the mere faith and credit of the State itself. By virtue of their sale, no new duties are imposed upon the rail-

road company. No duty from the company to the purchaser from it of the State bonds is defined, or referred to. There is none, except that which the law raises upon every sale of negotiable securities, which pass by delivery merely, and where the sale is not affected by an indorsement, or accompanied by a guaranty. The railroad company, it is true, is already under an obligation to pay these bonds, principal and interest; but that obligation is to the State alone, and arises upon its contract with the State. The purchaser has acquired by his purchase *no assignment of that contract or the duty arising under it.* He has in it no legal or equitable interest. It was not made for his benefit, nor at his request, nor was it one of the terms of any agreement entered into with him. There is no privity between him and the State, except what arises upon his ownership of the State's bond. There is none between him and the railroad company, except upon the terms of the sale by the railroad company to him, which was simple and absolute. The statute in question contains no words, declaring any right, nor stipulating for any interest on his behalf.

The reservation is to the State alone, and there is *no declaration of trust, as to the lien, in his favor.* There was no consideration moving from him to the railroad company for any debt due from it to him. The money he paid for the bonds was not an advance, by way of loan, to be repaid; it was a purchase of a marketable commodity at its market value. The consideration paid by him was solely for a transfer of the obligation of the State, and not for any promise of the railroad company, and the contract between them became fully executed, by the receipt of the money and the delivery of the bond.

It is true that, by the words of the law, which is the instrument of the contract, the lien reserved to the State is to secure "the payment by said company of said bonds, with the interest thereon, as the same becomes due," and it is argued that this language imports a promise and undertaking, and therefore contains an obligation on the part of the railroad company that it will make the payment accordingly, and, because this payment can only be made to the holder of the bonds, it is inferred that the promise, although made to another, yet enures to his benefit, in such sense as to entitle him to enforce, by judicial process, its performance.

But there are two points, in answer to this view, to be noted.

1. The first is, that the language referred to, does not create a corporate or personal obligation on the railroad company to pay the bonds. That obligation exists, but not by virtue of that reservation. It arises, by implication of law, and not upon the statute; from the nature and circumstances of the transaction, that is, upon the fact of the loan by the State to the railroad company of State bonds; and the lien reserved is described, in the words quoted, *to secure the performance of that pre-supposed and pre-existing obligation.*

When it is observed that this language does not at all relate to, or define, the obligation of the company, the whole subject is relieved of any difficulty which might otherwise have been supposed to attend it. We are at once directed to other parts of the statute, where that obligation is defined. *It would have been precisely the same had the lien clause been wholly omitted.* The lien is merely security for the performance of the obligation as defined in the statute else-

where, and as it is to be implied from the general nature of the contract.

It is not material whether the words, "*as provided in this act*," in the 4th Section, relate to the issuance of the bonds, or to their payment. The language will bear either construction. In either event, however, the obligation of the company was to make payment, in the mode, and to the person or persons, contemplated by the statute.

In the case of *The United States vs. Union Central Railroad Company*, 91 U. S., 84, the language of the statute was,

"That the grants aforesaid are made upon condition *that the said company shall pay said bonds at maturity*," etc., "and all compensations for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid."

The claim was made upon this language that the obligation of the railroad company was to pay according to their tenor the very bonds themselves, not, indeed, to the holders, but to the United States, as it paid to the holders. But the Court refused to adopt this view. It said:

"The bonds in question were bonds of the United States promising to pay to the holder of them, one thousand dollars, thirty years after date, and the interest every six months. This obligation the government was required to perform; and as the bonds were issued and delivered to the corporation to be sold for the purpose of raising money to construct its road, it is insisted that Congress must have meant to impose a corresponding obligation on the corporation. In support of this construction, it is sought to give to the word 'maturity,' a double signification, applying it to each payment of interest as it falls due, as well as to the principal. But this is extending, contrary to all legal rules, the operation of words by a forced construction beyond their real and ordinary meaning. Courts can not supply omissions

in legislation, nor afford relief because they are supposed to exist."

The real result of this decision was to hold, that the words expressing the obligation of the company above quoted, did not mean that it was bound literally to pay the bonds at all, but that it was bound to pay to the United States, when the bonds matured, the amount of the principal sum, with the interest which had in the meantime accrued upon them—in other words, pay a debt to the United States, on account of the loan of these bonds, and measured by the amount of their principal and interest, but not the bonds themselves. The latter would have required them to pay to the holder according to the tenor of the obligation, both as to principal and interest, as is claimed in these cases.

The language of the Act of Congress construed in the case cited, reserving the lien, is pertinent to the present argument. It is, that "the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of railroad," etc.

And it is also provided (Section 6), that "said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par," etc.

The idea of these provisions corresponds, and is substantially identical with that expressed in the Tennessee internal improvement act of February 11, 1852.

If this act could be construed as creating an express obligation to pay the bonds, there is nothing to bring it within that class of promises made to one person, for the benefit of the third, which gives a direct right of action upon it, in favor of the latter.

The rule on that subject requires, not merely that the performance of the promise should be beneficial to the party claiming the right to enforce it, but that it was the intention of the parties to give him not merely such a benefit, but such a right. It must appear that the benefit to him was the very object of the contract.

And even, admitting the assumption of a personal undertaking on the part of the railroad company to pay the bonds, as a direct obligation to their holders, and considering the claim as founded on the idea of trust, established by the reservation of a lien on or estate in property for the benefit of the holders of the State bonds, loaned to the railroad company, which they would be entitled to on the ground of contract and in equity to enforce, the rule would still require language, from which the inference would naturally arise, that the object of the arrangement was to provide for and confer upon the bondholder as such beneficiary, an estate which the Courts would recognize and subject for his use.

The language actually used does not answer that description. The bondholder would undoubtedly reap an expected benefit by the payment of the railroad company of the principal and interest of the State bonds held by him. But that it was to insure to him the advantage of such security certainly does not appear to have been the purpose and object of the provision. What is particularly manifest on the other hand is, that the State was solicitous for its own interests, and fearing lest the railroad companies might not promptly provide the funds in advance, or might even afterward fail to reimburse it for any necessary advances, on account of the principal and interest of the bonds, on which it alone was liable to the holder, and to whom, in the first instance,

the holder would certainly look, had made careful reservation of this lien, for its own protection and indemnity.

The other provisions contained in the same sections strongly corroborate this view. The conditions required to be antecedently performed—that *bona fide* subscriptions, good and solvent, for capital stock, sufficient to prepare for the iron, the whole extent of the main trunk line proposed to be constructed; that a section of thirty miles should have been actually prepared for the rails; that it should be free from all incumbrances; and the subsequent condition by which it was made the duty of State officials personally to see and know that the proceeds of the bonds, when sold, should not be applied to any other purpose than the purchase of rails and equipments, all show that it was the principal and only declared purpose of the law, by providing a security, that should be real and ample, to reserve to the State a resource of indemnity that would according to all probable calculations effectually render any advances from its treasury unnecessary; or, if not, would at least make certain their reimbursement.

The assertion by the complainants of a right of action upon the lien is conclusively answered by the decision of this Court in *National Bank vs. Grand Lodge*, 98 U. S., 123. The learned counsel for the appellants assume that this decision is not in point in this discussion for the reason that the contract in question in the cause was executory. (Brief, p. 271). It is true that this was the principal, and a sufficient, ground for the opinion. But, in the course of the opinion, Mr. Justice Strong states the law applicable to the present case thus:

"We do not propose to enter at large upon a considera-

tion of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands, or under his control, which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather upon the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is when the plaintiff is the beneficiary solely interested in the promise, as when one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt, being primarily for the benefit of the original debtor, and relieve him from liability to pay it (there being no novation) he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and thereupon the rule *is that the original creditor can not sue.* His case is not an exception from the general rule that privity of contract is required."

This reasoning applies distinctly and directly to the present case. If there is an obligation under this statute, on the part of the railroad companies, to the holders of State bonds, negotiated and sold by them respectively, there certainly is one also to the State, and the two are not the same, but distinct, so that the railroad companies are liable to actions on the part of both, yet, for the same cause. The obligation to the State, by the express words of the act, arises upon the issue by the State to the railroad companies of its bonds; and it is complete and perfect in its origin, and undergoes no transformation afterward. The supposed obligation to the bondholder does not begin until the rail-

road companies transfer the bonds to him. And yet, by the terms of the statute, there is but one lien, and but one obligation. And the conclusion reached, upon the supposition of a right of action in the bondholder, upon this reasoning, is that the lien is vested in the State, not for its own benefit at all, but altogether for the benefit of the holders of its bonds.

The natural and obvious meaning of the law is the very reverse of this, and requires the construction that ignores any such right on the part of the holder of State bonds, and declares that the lien reserved is for the State alone, as security to it that the railroad companies will perform their obligation to it, arising from the loan to them of its bonds. A signal proof and illustration of this is found in the case of *Murdoch vs. Woodson*. 2 Dillon C. C. R., 188.

S. C., *Woodson vs. Murdoch*, 22 Wall., 351.

In that case, it appeared that, by an act of the General Assembly of the State of Missouri, to expedite the construction of the Pacific Railroad, and of the Hannibal & St. Joseph Railroad, the governor of the State was authorized to issue and deliver to each of said companies, "as a loan of public credit," bonds of the State, payable to the order of the said companies respectively, transferable by indorsement, which "indorsement shall be considered the act of the company." For the payment of the interest, and redemption of the principal thereof, the faith and credit of the State were thereby pledged; and the acceptance by the said companies, of said act, was declared

"To become and be, according to all intents and purposes, a mortgage of the road of the company executing and filing their acceptance, as aforesaid, and

every part and section thereof, and its appurtenances, to the people of the State, *for securing the payment of the principal and interest of the sums of money for which such bonds shall from time to time be issued and accepted, as aforesaid;*" and it was thereby also required that "each of said companies shall make provision for the *punctual redemption of the said bonds so issued*, as aforesaid, to them respectively, and for the *punctual payment of the interest* which shall accrue thereon; in such manner as to exonerate the treasury of this State from any advances of money for that purpose; and the tolls and income which shall accrue from the use of their said roads respectively, when the same or any part thereof shall be constructed, after paying the repairs and the necessary expense of operating the same, and conducting the business thereof, shall be and are hereby pledged for the payment of said interest."

In case of default as to either interest or principal, the governor was authorized to sell the road of the delinquent company to the highest bidder, or to buy it in for the State, subject to the future disposition of the legislature.

Under this act, bonds of the State, to the extent of $7,000,000, were issued to the Pacific Railroad Company, which, with arrears of interest, at the time of the subsequent settlement, amounted to over $10,000,000. In 1868, the legislature passed an act which authorized the governor to release the lien of the State, on payment by the railroad company of $5,000,000, either in cash or in Missouri State bonds, which was done, the company raising the means for that purpose by an issue of its own bonds, secured by a mortgage of which Murdoch, the complainant, was trustee. Subsequently, the governor of the State—doubts of the validity of this release, and of the constitutionality of the law under which it was authorized, having been suggested—advertised the road for sale, in execution of the power of sale reserved in the original act creating the lien. To restrain

that intended sale, by injunction, was the prayer of the bill in that case.

JUDGE DILLON, in deciding the case, said:

"It is next urged that the statutory lien in favor of the State was reserved by it, not exclusively for its own indemnity, but for the benefit of the holders of *its* bonds, and, therefore, the State, holding the lien merely as a trustee for its bondholders, could not release such lien while its bonds were outstanding, as they still are. None of the holders of these bonds are here, and it is not needful that we should inquire what *equities* they might have, should the State refuse to pay them, and should they apply for relief against the railroad company or its property. I am inclined to think, however, that the form of the transaction indicates the intention of the parties. The State issued its bonds, and these were negotiated and taken upon the State's 'faith and credit,' without any accompanying security. To indemnify itself, the State provided for and received a mortgage upon the road of the company, and a pledge of its net tolls and income. Then comes the further provision that the companies shall punctually pay the interest and principal of the bonds, but, if they fail to do so, the State may sell the road to others, or buy it in itself, to be thereafter disposed of, as the legislature may direct.

"It could not be maintained, we think, that if a sale were made by the State to a third person, that he would take it subject to a lien in favor of the holders of the bonds of the State. Such a view seems to be inconsistent with the provisions of the act under which the aid was given, and the lien reserved to the State, with the provisions of the fourth and fifth sections of constitutional ordinance as expounded by the Supreme Judges (37 Mo., 129, 134), and with the entire State legislation on the subject of disposing of roads purchased by the State under the lien reserved to it. The judges, in their answer to the governor, distinctly say that: 'When the State becomes the purchaser of the railroad, under the lien reserved, both the lien and the former company are extinguished. The State remains liable for her own bonds, and owns the railroad, and the State may sell it without reserving a lien for the whole indebtedness to the former com-

pany, but only for the unpaid balance of the purchase-money.'"

37 Mo., 134.

From the decree of the Circuit Court, granting a perpetual injunction against the sale of the road, for the enforcement of the lien claimed by the governor of the State, the latter appealed to the Supreme Court of the United States, where it was affirmed. 22 Wall., 351. It was there held that a constitutional provision, that "the General Assembly shall have no power, for any purpose whatever, to release the lien held by the State upon any railroad," did not prevent the General Assembly from compromising the debt created in favor of the State by the loan and advance by it of its bonds to the railroad company, and thereby by extinguishing the debt, discharge the lien reserved by its security. It was necessarily assumed and decided that the lien reserved by the Missouri statutes, involved in this case, belonged to the State alone and for its own benefit exclusively; for, otherwise, the Court must have decided the case the other way, and refused the injunction. If the State by its legislation had not the lawful authority to dispose of the debt for which the lien was reserved as security upon its own terms, as it did, receiving much less than the face of the debt in satisfaction, and accepting payment, not in the very bonds originally loaned, but in any bonds of the State, then there was no ground on which to enjoin the governor from proceeding to sell the road by way of enforcing the lien. And if the lien was reserved for the benefit of the holders of the State bonds, advanced to the railroad company, then payment to the State would not discharge the lien, for it was only on the ground that the lien was an incident to the debt

it was reserved to secure, that it was decided that payment of that debt operated in law to discharge the lien. The lien vanished by mere operation of law, on payment to the State of what it agreed to receive in satisfaction of its own claim, and leaving unpaid the original bonds in the hands of holders, on which and to whom the State continued to be liable. Is not this conclusive that the Court necessarily adjudged that the holders of State bonds had no interest in the lien reserved in the name of the State?

It is true, that the point was not made in argument, in that Court, although it was in the Circuit Court, because, perhaps, it was not considered tenable; but the decision of the Court necessarily rests upon the assumption that the lien belonged to the State alone, and was a security for the debt due to the State, and not by the State to its bondholders. On the contrary supposition, the judgment would be manifestly erroneous, upon its own argument.

This decision concludes the present case, if followed, unless a sufficient distinction, to prevent that consequence, can be established between the meaning of the statutes of Missouri and those of Tennessee, involved in this argument.

It becomes relevant to the argument, therefore, to make this comparison:

The Act of the General Assembly of Missouri is entitled an act to expedite the construction of the Pacific Railroad and of the Hannibal & St. Joseph Railroad.

On certain preliminary conditions being fulfilled, bonds of the State, called "special," were to be issued to these roads respectively, as a loan of the public credit, bearing interest from the time they are negotiated in the hands of the

holder. The companies are required to make a formal acceptance of the act, a certificate whereof recorded in the office of the Secretary of State, shall "thereupon become and be, according to all intents and purposes, a mortgage of the road, etc., to the people of this State, *for securing the payment of the principal and interest of the sums of money*, for which such bonds shall from time to time be issued and accepted as aforesaid." The faith and credit of the State are by the act pledged for the payment of the interest and the redemption of the principal of the bonds. Those issued to one company are denominated "The Pacific Railroad State Bonds;" to the other, "The Hannibal & St. Joseph Railroad State Bonds." They are to be made payable to the order of the said companies respectively, and "may be transferred by the indorsement of the respective presidents of the said companies for the time being, *and such indorsement shall be considered the act of the company;* and a copy of this act shall be attached to each of said bonds." The companies were authorized to confer upon any holder of any bond, transferred by it, the right to convert the same into the stock of the company, and upon such conversion the bond so converted was to be delivered to the Governor of the State to be cancelled. Section 9 of the act enacts that

"Each of said companies shall make provision for the punctual redemption of the said bonds, so issued as aforesaid, to them respectively, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonorate the treasury of this State from any advances of money for that purpose; and the tolls and income which shall accrue from the use of their said roads respectively, when the same or any part thereof shall be constructed, after paying the repairs and necessary expense of operating the same, and conducting

the business thereof, shall be and are hereby pledged for the payment of said interest."

No part of the bonds authorized shall be issued until the governor and attorney-general are satisfied that no prior lien or incumbrance has been created or exists on the road of such company," except such lien as may have been created under this act." In case the said companies, or either of them, to which bonds shall as aforesaid be issued, shall make default in the payment of either interest or principal of the said bonds, or any part thereof, it shall be lawful for the governor to sell their road and its appurtenances by auction to the highest bidder, on six months' notice by public advertisement, or to buy in the same at such sale, for the use and benefit of the State, subject to such disposition in respect to such road or its proceeds, as the legislature might thereafter direct.

The particulars in which it thus appears that the Missouri statute differs from those of Tennessee, point distinctly in favor of investing the holder of the State bonds under the former with an interest in the lien, as reserved for its bene fit, rather than in the opposite direction. These particulars may be briefly enumerated as:

1. The *special character and designation* of the bonds issued to each company, by its name, as Pacific Railroad State bonds, etc.

2. The bonds are payable to the order of the company to which they are loaned, transferable only by an indorsement, which is expressly declared to be the act of the company, whereby the company becomes party to the obligation of the bond, a direct debtor to its holder, and principal debtor, as, by the terms of the act, made part of the bond,

the latter is shown to be a loan of credit on the part of the State.

3. The bonds do not take effect as obligations, until negotiated in the hands of a holder, that being the time when they begin to bear interest, as declared in the first section of the act, and, consequently, the time when the lien reserved begins to operate and become effective.

4. The bonds may be made convertible into stock of the company negotiating the same—a quality conferred in the act and terms of indorsement—showing that they do not become perfected obligations, until delivered and the railroad company has become a party to them.

5. The express obligation of the company is to make timely provision for the punctual redemption of the very bonds issued to them respectively, and for the punctual payment of the interest, *eo nomine*, which shall accrue thereon, so as to exonerate the treasury of the State from any advances of money for that purpose, showing that the payment is to be made distinctly and directly to the holder, and not otherwise. The language in which this obligation is expressed effectually dispels every inference to the contrary, that might otherwise be drawn from that in which the lien is declared, in section 4, to be "for securing the payment of the principal and interest of the sums of money for which such bonds shall from time to time be issued and accepted as aforesaid." The obligation is not to repay to the State any sums of money it may pay on that account, but to pay primarily and directly to the holders the principal and interest of the very bonds held by them, so as to make payment by the State unnecessary; and the lien is to secure the performance of that very obligation.

The argument, therefore, built upon the authority of the decision of the Supreme Court of the United States, in the case of *Woodson vs. Murdoch*, 22 Wall., 351, is greatly strengthened, and not weakened, by a comparison of the particular provisions of the Missouri statute, which established the character of the lien in that case, with those of the statutes of Tennessee, which fix the characteristics of the one which constitutes the subject of the present discussion.

It is proper, in this connection, to refer to the statute of South Carolina, "to aid in the construction of the Charleston and Savannah Railroad," 12 Stat. S. C., 543, passed December 20, 1856. The Supreme Court of that State has decided that the lien reserved by that act inures to the benefit of the holders of the bonds, and its judgment is relied on, with confidence, by counsel, as an authority adverse to the view now urged. It is to be admitted, in the first place, that the terms in which the lien is described are identical with those used in the corresponding section of the internal improvement acts of Tennessee, of 1851. *Hand vs. R. R. Co.*, 12 S. C.

The bonds, it is declared, "shall constitute a lien" upon the road, etc., and "the State of South Carolina shall be invested with a lien, without a deed from the company, upon the entire road, etc., for the payment of all said bonds," etc. But, without here bringing into notice the various other and important particulars in which this statute differs from those involved in this case, it is necessary now to advert to but one, which establishes the contrast. The bonds contemplated by the South Carolina law were not the bonds of the State, loaned to the railroad company, and by it sold to the

holders. *They were bonds of the railroad company itself*, indorsed by the State, with its guarantee; and it was to secure the payment of these bonds, principal and interest, that the lien was reserved in the name of the State, but with the same effect as if a deed of mortgage had been made to it for that purpose. In such a case, the condition of the mortgage, in the usual form, would be that the mortgagor should pay the principal and interest of its bonds, according to their tenor and effect, or, in default, that the mortgaged estate should become absolute in the mortgagee. It would, in that event, have presented the ordinary case of a mortgage given by a mortgagor to its surety, to secure the payment of its own obligations, as a principal, to those who hold them. The debt is due directly to the bondholder. The promise and contract are immediately to and with him. There is a direct privity between them. The State is made surety and trustee, by contract, of the mortgaged estate, directly for the creditor, and only indirectly for its own benefit and security; and the mortgage passes as an incident to the very debt it was framed to secure—that is, the debt evidenced by the company's own bond.

Our learned adversaries cite the 139th Section of Prof. Pomeroy's Work on Remedies, in which it is declared that it is the "American doctrine that one who is both a stranger to the contract and the consideration may sue upon a contract between the defendant and a third person." This announcement is, as we have shown, directly in conflict with the decision of this Court in *Bank vs. Grand Lodge*, and it is at variance with the weight of authority. Mr. Pomeroy admits that the contrary is the settled law of England "and some of the States, notably Massachusetts,"

citing the opinion of GRAY, C. J., in *Exchange Bank vs. Rice*, 107 Mass., 37.

The leading authority in support of this alleged "American doctrine," is *Lawrence vs. Fox*, 20 N. Y., 268.

In that case Holly, at the request of the defendant, lent and advanced $300 to him, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the next day; and the defendant, in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff the next day. It was held that the plaintiff could maintain the action. Some of the judges placed the decision upon the ground that the money in the defendant's hands was the plaintiff's money, and the promise to pay to him being *direct*, a cause of action arose in his favor as for money had and received. Others of the judges (Johnson and Denio) assented to the judgment on the theory of the promisee being the plaintiff's agent in making the contract.

It will be observed that in *Lawrence vs. Fox, the promise of the defendant to pay the plaintiff was single, plain, express and direct, not connected with other promises—solely for the benefit of the promisee—not depending upon the performance of any covenants by the promisee; and that, moreover, the promisee divested himself of all further interest in, or claim to, the fund which he furnished the defendant for the sole purpose of paying the plaintiff the debt due him.*

And, again, the Court of Appeals say, in the very recent case of *Barlow vs. Myers*, 64 N. Y., 41 (1876,) per ANDREWS, J., that while the case of *Lawrence vs. Fox* has not been overruled, subsequent cases, which were claimed to fall

within it, have been distinguished from it, and the Courts have been disinclined to extend the doctrine of that case.

And in *Vrooman vs. Turner*, 69 N. Y., 282, it is said:

"The Courts are not inclined to extend the doctrine of *Lawrence vs. Fox* to cases *not clearly within the principle of that decision.*"

In *Turk vs. Ridge*, 41 N. Y., 201, the defendant in consideration of the conveyance of a farm to him by P., executed to P. a bond, conditioned for the payment of a promissory note given by P. to the plaintiff.

Held, by the Court of Appeals, that the plaintiff could not recover, the intent of the bond being merely *a promise for the indemnity of P.*, and not a promise to P. for the benefit of the plaintiff.

In the case of the *Ætna Bank vs. Fourth National Bank supra*, the Florence Mills, on the 2d of April, sent defendant a remittance, with written direction to credit their account with it, and charge against it a note falling due on the 4th of April, held by the plaintiff. The defendant received the remittance, credited the account to the Florence Mills with it, but instead of paying plaintiff's note, paid a past due note held by another party.

It was held that the plaintiff could not recover.

By the Court of Appeals, per ALLEN, J.:

"The agreement being with the depositor, *the responsibility for a breach of it was with the same party, and in the language of* DAVIS, J., *in Bank of the Republic vs. Millard, 10 Wallace, 152, it would be an anomaly in the law if another party could also have an action for the same thing.* * * * It is sought to bring this case within the principle of those in which a promise to one, for the benefit of another, has been enforced, at the suit of the latter. * * * *Lawrence vs. Fox*, was upon an express

promise to pay a sum, received by the defendant from a debtor of the plaintiff, to the plaintiff; and the promise was the consideration upon which, and *upon which alone*, he received the money. The money was appropriated by the debtor to the payment of a debt to the plaintiff, and entrusted to the defendant upon an express promise to pay that debt; and yet that case, very different in all the material facts and circumstances from this, was decided by a divided Court, and those who acquiesced in the judgment differing as to the grounds upon which the judgment should rest. * * * There was no special loan on an express promise to pay the plaintiff, and no one else; and there is no principle of agency in the case, which would bring the case within the reasons which led Judges JOHNSON and DENIO to assent to the judgment in the case last cited."

In *Garnsey vs. Rogers*, 47 N. Y., 233, it was held that a stipulation in a mortgage, whereby the mortgagee assumes and agrees to pay a prior mortgage on the premises, does not impose upon the mortgagee a personal liability for the prior mortgage, which can be enforced against him by the prior mortgagee; that the stipulation is not a promise made by the mortgagee to the mortgagor for the benefit of the prior mortgagee, *but is a promise for the benefit of the mortgagor only, for the purpose of protecting his own interests and property.*

By the Court of Appeals, per RAPALLO, J., page 240:

"I do not understand the case of *Lawrence vs. Fox* to have gone so far as to hold that every promise made by one person to another, from the performance of which a third would derive a benefit, gives a right of action to such third party, he being privy neither to the contract nor the consideration. *To entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be benefited;* and all that the case of *Lawrence vs. Fox* decides is, that where one person loans money to another upon his promise to pay to a third party, to whom the party so lending the money is indebted, the contract thus made by the lender is made for the benefit of his creditor, and the

latter can maintain an action upon it without proving an express promise to himself from the party receiving the money.

"JOHNSON, C. J., and DENIO, J., based their votes upon the distinct ground that the contract could be regarded as having been made by the debtor as the agent of his creditor, and that the latter could ratify the contract thus made for his benefit. * * * But in the present case, the agreement was not to apply money which the promisee delivered for the purpose, or which was due him from the promisor, to the use of a third party, *but the promisor engaged to advance his own money for the purpose of protecting the property of the promisee.* * * * *If such a contract could be enforced by the creditor who would be incidentally benefited by its performance, every agreement by which one party should agree with another, for a consideration moving from him to become security for him to his creditors, or to advance money to pay his debts, could be enforced by the parties whose claims were thus to be secured or paid. I do not understand any case to have gone this length.* This is not the case of a trust. If the property had been conveyed to Rogers, in trust to pay the plaintiff's claims, the legal estate would have vested in Rogers, and he would have been compelled to execute the trust; but no such trust was declared in the deed, nor could it be created by parol, as to real estate.

"It must further be considered, that where such an assumption is made on an absolute conveyance of land, it is unconditional and *irrevocable. The grantor cannot retract his conveyance, nor the grantee his promise or undertaking.* * * * *The reservation of this control by the grantor shows that the agreement was for his benefit only, and prevents its inuring to the benefit of any third party.*"

In *Blymire vs. Boistle*, 6 Watts, 184, the distinction taken in the *Ætna Bank vs. Fourth National Bank*, and in *Garnsey vs. Rogers*, is clearly pointed out.

Per SERJEANT, J.: "When one person contracts with another to pay money to a third, or to deliver over some valuable thing, and *such third person is thus the only party in interest, he ought to possess the right to release the demand or recover it by action.* But when a debt already ex-

ists from one person to another, a promise by a third person to pay such a debt, *being for the original debtor, and to relieve him from the payment of it, he ought to have a right of action against the promisor for his own indemnity; and if the promisor were also liable to the original creditor, he would be subject to two separate actions at the same time for the same debt, which would be inconvenient, and might lead to injustice.*"

In *Merrill vs. Green*, 55 N. Y., 270, *supra*, upon the dissolution of a firm consisting of Roberts and Green, Green took the partnership property, and delivered to Roberts a bond executed by himself, with Nichols as security, conditioned for his payment of the debts of the firm of Roberts &Green. In an action by the plaintiffs, as creditors of the firm of Roberts & Green, against Roberts and Nichols on their bond, held that their liability was to the obligee on the bond only, and that an action cannot be maintained on the bond by a firm-creditor to recover his indebtedness of the obligors.

By the Court of Appeals, per GROVER, J.: "The learned Judge, in giving the opinion of the General Term, suggests a doubt whether the plaintiffs, being creditors of Roberts & Green, might not, without a transfer of the bond to them by Roberts, have maintained an action against the defendants for the recovery of the debt, upon the principle settled in *Lawrence vs. Fox*. If the plaintiffs could recover upon the principle of that case, I am unable to see why they were not en itled to judgment in this action, * * * but I do not think the case within the principle of *Lawrence vs. Fox*. Green was liable with Roberts for the payment of the firm debts. He agreed with Roberts, upon a valid consideration, to assume the payment of the whole of the debts, and Nichols undertook that he should perform this contract. *This was no agreement made by Green and Nichols with the creditors, or for their benefit, but one with Roberts to exonerate him from his liability for the debts of the firm, by payment which Green was to make, and, in case of his default, such payment to be made by Nichols.* All the liability incurred

by either of them was upon the bond, and was to the obligee only."

Simson vs. Brown, was an action against defendant as guarantor on a bond to Boyd, providing for payment of $500 due plaintiff.

The Court say, per FOLGER, J.: "This is quite far off from a promise to Boyd for the benefit of Simson. The purpose was to secure the $500; and *the prominent idea in the minds of all was to save and protect Boyd from damage. It would of a neceesity also benefit Simson; but it does not appear that that was the prime purpose, or that the scheme was devised with any view to help him.* * * * It is not to be denied that the performance of the condition of the bond to Boyd would have worked, consequentially, a benefit to Simson, if it had been performed by the payment of the $500 and interest to him. *It might, then, be said in a way to have been a benefit to him in the execution of it. But it is not every promise made by one to another, from the performance of which a benefit may ensue to a third which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited.*"

See also, upon this topic, *Pollock on Contracts*, (Wald's notes), 197, and cases cited, *Halstead vs. Francis*, 31 Mich., 113, *Clapp vs. Lawton*, 31 Conn., 95.

In *Vrooman vs. Turner*, *supra*, this entire doctrine, whatever may be its scope, is declared to be a part of the equitable doctrine of subrogation (p. 282). As such it can have no application to the present case.

Thus it will be seen that the "American doctrine" is that which is stated by MR. JUSTICE STRONG in the case cited.

Further Examination of the Act of February 11, 1852.

At every step in the examination of this statute, is found

matter which is necessarily irreconcilable with the idea of a trust in the State for the benefit of her bondholders.

1. The first section of the act requires that it shall be made to appear to the governor, as a condition precedent to the issue of bonds, that the applying company's line of road "is not subject to any lien whatever, other than those created in favor of the State by the Acts of 1851–52." This provision plainly refers to two acts.

The first was that of January 15, 1852, which authorized the governor to issue bonds of the State of Tennessee, to the amount of $300,000, to the East Tennessee & Virginia Railroad Company, to aid in the building of bridges. It was provided that "the said bonds shall, on issuance thereof, constitute a lien" upon the stock, road-bed, and property of the company, and that the State should be "invested with such lien on and by virtue of the issuance of said bonds, without a deed from the company, for the payment of said bonds and interest accruing thereon," "and the said lien of the State shall extend to and embrace the entire railroad, its superstructure, and equipments after completed, and so continue until said bonds and interest thereon are paid off and discharged and without a deed from the company."

The second of these acts was that of February 4, 1852, "to aid in the completion of the East Tennessee and Georgia Railroad." It provided for an issue to the company of that name of $100,000 of six per cent. coupon bonds of the State to pay for the construction of a bridge over the Tennessee river at Blair's Ferry; and for the purpose of enabling the State to raise a fund for the payment of the interest on said bonds, and also to pay the principal at or *before* maturity, it was authorized to demand and collect a

bridge toll for its use, to be deposited monthly in bank, subject to the check of the comptroller of the treasury, for the payment of interest, and any overplus *to be passed to the credit of the company, in discharge of the principal due on any one or more of said bonds.* It is further enacted, "that the express conditions on which any bonds under this act shall be issued to said company, are that, upon the issuance of said bonds, the said railroad and bridge, with all the appurtenances thereto belonging, and the interest of the individual stockholders therein, and the tolls, issues and profits of said road and bridge, shall be and is by force of this act vested in the State, *for the security of the State*, against the payment of the bonds issued under this act, and the interest thereon, and the State is hereby declared to be vested with all the rights to have and to hold, upon the issuance of the bonds authorized by this act, the entire road and bridge, and all the appurtenances thereto belonging, and all the tolls, issues, and the profits of the stock for the security of the payment of said bonds, and the interest thereon accruing, as a mortgage to secure the payment of the same, and said road and all its appurtenances of every kind and description, shall be subject to any law that has been or may hereafter be passed for the enforcement of mortgages in like cases."

Reference is made to these enactments as assisting in the construction of those subsequently passed, not merely on the principle of being in *pari materia*, but because express reference is made to the lien created by them, in the first section of the act of February 11, 1852, as already cited. That reference establishes the identity of the lien as being intended exclusively for the security of the State, of all the acts taken together; for, if they become, on the negotiation

of the bonds, property vested in their holders, then the liens created under the earlier of these enactments, became, upon the issuance of bonds under them, inconsistent and irreconcilable with the paramount rights of those arising under the subsequent legislation. The evident intention of the legislature was that the lien under all the statutes, being in favor of the State alone, and for its sole use, was a single and consistent thing.

The fifth section of the act makes it the duty of the company to deposit in the Bank of Tennessee, at Nashville, at least fifteen days before the interest becomes due, from time to time, upon the bonds issued as aforesaid, an amount sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that said interest has been paid or provided for.

It cannot be doubted that the bonds issued under these acts would have priority over bonds issued under the act of February 11, 1852, or any later act, if the lien was for the security of the bondholder. Such bonds were in fact issued.

2. We have shown that, under the second section, the entire transaction might have been executed in such a way as to constitute simply a loan of money by the State to the company. Had it been so executed, it would be plain that the obligation of the company was but to repay to the State the money loaned, in the manner, and at the time prescribed in the statute. It is equally plain that the obligation of the company is the same whether the bonds, or their proceeds, be delivered to it.

3. The use of the words "payment of the bonds" in the third and fourth sections are regarded by appellants'

counsel as fully and conclusively descriptive of the obligation of the company. This is to ignore every other part of the statute, and to disregard the most simple and elementary rules of construction, which require that the whole act shall be examined. We have already called attention to the fact that these words but relate to the lien, and do not profess to define the obligation of the company touching the payment of the debt, and that, viewed in this light, these words mean that the lien should secure to the State the means with which to pay the bonds.

These identical words occur in the Pacific Railway Acts of Congress, and this Court has held that they do not mean payment by the company to the bondholders, because other parts of the statute indicate a contrary intention.

In *Hand vs. R. R.*, 12 S. C., these words were held to import payment to the bondholder, because the bonds, the payment of which was thus secured, were the bonds of the company. It had expressly bound itself to the holder to pay them, and no other payment was alluded to in any way in any part of the statute.

4. The fifth section relates to the "payment" of interest. The company is required to deposit in the Bank of Tennessee, at least fifteen days before the maturity of each instalment of interest "*an amount sufficient to pay such interest.*" This is the obligation of the company. This is one of the things secured by the lien.

The company is accorded the right to pay the interest, or to provide it in some other way, and the State agrees to be satisfied with this, upon being furnished with "satisfactory evidence" that it has been done. But this is a right, and not an obligation, the obligation is to pay into the Bank of

Tennessee, not the interest, but a sum equal to the amount of the interest—a sum "sufficient to pay" the interest.

It is not claimed by the learned counsel for the appellants, that this is payment to the bondholder, but it is claimed that the Bank of Tennessee becomes the agent of the company for the purpose of making such payment. But this claim cannot be successfully made.

This Court has more than once had occasion to examine the laws under which the Bank of Tennessee existed. It was more than a mere "fiscal agent" of the State. It was, as said by MR. JUSTICE DAVIS, in *Furman vs. Nichols*, "a State institution." Payment of this amount of money was payment into the State Treasury. The State had no other treasury All its funds were kept in this bank, and the treasurer drew his checks upon it for such sums as it was his duty to disburse. According to the usual course of the business of the State, this bank paid all coupons of the bonds of the State of Tennessee, without regard to the character of the bonds. When such payments were made, and reported to the treasurer, he issued his check to the bank, upon the State's funds in the bank, to balance the account. The transaction was precisely the same as it would have been if the treasurer had drawn his check beforehand to the order of the New York Bank which actually made the payments. (M. & C. record, 857, 861.)

The law must be read in the light of this mode of doing business. The contracting parties evidently understood that this was the method contemplated by the statute, for they acted upon it from the beginning.

The amount paid into the bank went to the credit of the State upon the books of the bank, in accordance with the

terms of the law, as all concerned understood it. This is an instance in which contemporaneous exposition is of great importance. There can be no doubt that the law was correctly interpreted by them.

This payment to the State was to be made fifteen days before the maturity of the State's obligation to the bondholders.

This section authorizes the comptroller of the treasury to draw his warrant for any sum necessary to meet the bonds, not provided for by the railroad. Such a warrant would place this fund in the Bank of Tennessee, to be used by the bank as it used any funds of the State, in paying interest upon the State's bonds. No matter whence the money came, the bondholder would receive payment from the State.

Reliance is placed by our adversaries upon the use of the word "*deposit*" in this section. It is argued that this is an ordinary deposit in a bank. Certainly it is not this, upon any possible view of the statute. An ordinary deposit simply creates the relation of debtor and creditor between the bank and the depositor. The money becomes the money of the bank, and the bank becomes a debtor for the amount of the deposit. (*Bank vs. Millard*, 10 Wall., 155.)

The bank does not become in any sense the agent of the depositor. In the present case, the deposit was made to the credit of the State, and was subject to the check of the treasurer of the State. The required payment of commissions was for the purpose of indemnifying the State against such payment. Similar payment was required under the Act of February 21, 1852, for engraving, signing and countersigning, etc. The comptroller and secretary cannot

be said to have been the agents of the railroad companies, because the railroad companies were required to pay fees to them. Fees to the bank, another agent of the State, stand upon the same footing. And yet, our learned friends say (p. 197, Comp. Brief), that this payment is "of itself conclusive evidence that the bank was the agent of the company."

The statute of Maryland, which this Court construed in *Maryland vs. R. R. Co.*, 22 Wall., 105, contained a provision that the company should pay, ninety days before the maturity of the interest, the amount of that interest, "together with the cost of transmitting said interest to London to be there paid, and also the difference in the exchange," and yet this Court declared that this entire provision, "was a stipulation for indemnity."

Counsel for the appellants are forced to the assertion that this payment of the interest is at the risk of the company, and that the failure of the State to apply the amount thus deposited would subject the company to the necessity of paying a second or even a third, or an indefinite number of times, for the misapplication of the deposit might be repeated as often as the deposit would be made.

This claim is made in the face of the fact that this deposit of the money in the State treasury to enable the State to meet her obligation is the obligation which the statute imposes upon the company! If the company pays the amount which the statute requires it to pay, at the time, and to the person or persons named in the statute, it cannot be required to pay again.

In case any company make default in providing this

fund for payment of interest, fifteen days before it is due to the bondholder by the State, it becomes the duty of the governor to put the delinquent road into the hands of a receiver, who shall apply the income of the property to the liquidation of such unpaid interest. The whole civil power of the State is placed under his command, to enable him to execute this process; and he is required to continue his possession, until a sufficient sum shall be realized to pay off and discharge the interest, as aforesaid. But, in the meantime, it is made the duty of the comptroller, upon his warrant, to draw from the treasury any sum of money necessary to meet the interest on such bonds, as may not be provided for by the company.

The obligation imposed upon the receiver by this section, to settle his accounts with the comptroller, and pay the balance into the treasury of the State, is equally significant. This means the "balance" which shall appear in his hands at each settlement, after deducting the operating expenses of the road. It is to be "deposited" in the State treasury.

It is not possible to reconcile these stipulations with the idea that it was the intention of the legislature to confer upon individual bondholders a right, in their own names, and on their own behalf, to proceed in equity for the appointment of a receiver—for the application of the revenues of delinquent roads to the payment of their interest. The actual provision of the law is that their interest shall be paid directly by the State out of its own treasury; *and the law contemplated no default in this respect.* That being so, it is impossible to argue that its intention was to provide for a case which it did not contemplate as possible to happen. The default of the railroad companies was a contingency

present to the minds of the legislature, and embraced in its intention, and provision to meet it was accordingly made. The remedy was the appointment of a receiver, by the governor, for the State, and for the State alone—not in trust, and for the use of the holder of State bonds, but for its own security, and reimbursement, for it had been by this very act made *legally impossible* that such default, on the part of the railroad company, *could be injurious to any one else.* This section, then, expressly and necessarily excludes the conclusion that the complainants, under any circumstances, can be entitled to the relief they now seek. The only duty owing to them, by its terms, is from the State itself, and, as no breach of that was anticipated, so it was not provided for, and its breach, actually happening, is left without remedy.

Section 6.—Foreclosure.

The fifth section relates to the remedy for non-payment of interest, and we have seen that the payment required was a payment to the State, at a date different from, and anterior to the maturity of the interest upon the State's bonds, and that the remedy for default was given to the State alone, and the object of the remedy, and the result of its exercise, was to put the money into the State treasury.

The sixth section relates to the non-payment of the bonds at maturity, and the remedy for such non-payment.

The substance of the provision is that if bonds shall have matured, without compliance by the company with its obligation touching their payment, whatever that may be, the governor shall notify the Attorney-General to file a bill in equity, in the name of the State, against the defaulting com-

pany, and the Court is thereupon to make such orders and decrees as may be deemed necessary by the Court, "to secure the payment of said bonds, with the interest thereon, and to *indemnify the State of Tennessee* against any loss on account of the issuance of said bonds, by ordering the said railroad to be placed in the hands of a receiver; ordering the sale of said road, and all the property and assets attached thereto, or belonging to said company, or in such other manner as the Court may *deem best for the interest of the State.*"

Carefully considered, this section is of the utmost importance in this discussion. The following arguments are to be drawn from it:

1st. It declares the object of the enforcement of the security to be to "indemnify the State of Tennessee." The purpose of the security, and the purpose of its enforcement, are necessarily identical. Here is an express declaration that the object of this security was the indemnity of the State.

2nd. There is no allusion to the bondholder, although it is a provision for the entire disposition of the security.

3rd. The State of Tennessee confers by this section, upon one of her own Courts, the most complete discretionary power over the disposition of the entire property, such disposition to be made with reference to the interest of the State alone.

4th. These proceedings are to be taken after the maturity of the State's obligations. Why are not the holders of the bonds alluded to? Because, at the time contemplated by this section, the bonds are presumed to be in the hands of the State, duly paid. Is it possible that the legislature contemplated the failure of the State to meet her own obliga-

tion? Certainly not. The supposition of the law and the basis of the scheme of its provisions is, that the bonds, having matured, the State itself, in default of the railroads, has paid them, as by their terms it has pledged its faith and credit to do. And nothing is left but to render effectual the lien and indemnity which the State had by this legislation provided for itself, and that is, to enforce by the means and processes of equity its remedies against the property, pledged as its security, in such manner as shall to it and to its Courts seem best for its own interest. The mistake and fallacy of the complainants' claim, and the argument of their counsel, is in supposing that the State of Tennessee was legislating in these acts for the purpose of securing its own bondholders against its own foreseen and anticipated dishonor. Upon what canon of interpretation can such a construction be justified?

Section 7.—The Sinking Fund.

This section is as follows:

Sec. 7. *Be it enacted*, That at the end of five years after the completion of said road, said company shall set apart one per centum per annum upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the company shall pay into the treasury of the State, after assigning them to the governor, and for which the governor shall give said company a receipt, *and as between the State and said company, the bonds so paid in shall be a credit on the bonds issued to the company; and bonds so paid in, and the interest accruing thereon, from time to time, shall be held and used by the State as a sinking fund for the payment of the bonds issued to the company, and should said company repurchase any of the bonds issued to it under the provisions of this act, they shall be directed as aforesaid*, AND CANCELLED. And should said company fail to comply with the provisions

of this section, it shall be proceeded against, *as provided in the 5th section of this act.*

As the payment of a sum equal to the interest, into the State treasury, *i. e.*, into the Bank of Tennessee, fifteen days before the maturity of the State's obligation to pay interest, as provided by the fifth section, is the only provision in the statute as to interest, so this section contains the only provision upon the subject of the payment of the principal, so far as the railroad company is concerned. Mr. Southmayd has prepared a statement which shows that this sinking fund would have paid the entire debt if, the terms of the law had been complied with, in thirty-three years and two months! The bonds authorized were to run not less than thirty, or more than forty years. In point of fact, the bonds issued were generally forty year bonds. The payment was to begin "five years after the completion of the road." The amount of the sinking fund, the term of the bond, and the date of the commencement of the payment, were no doubt carefully calculated. Inasmuch as the payment to be made under the fifth section was to begin at the date of the first maturity of interest, the entire debt of the company to the State, would, under ordinary circumstances, be paid before the maturity of the State bonds. Whilst the law thus stood, some issues of bonds were made to the East Tennessee, Virginia & Georgia Company, and the Memphis & Charleston Company, having forty years to run. It was observed, by the legislature, after the issuance of these bonds, that the railroad company might receive bonds upon its finished sections of thirty miles, from time to time, and that the completion of its road might be delayed indefinitely, so that the re-payment would not begin until a period so

late, if at all, that the bonds would not be provided for at maturity. Hence the enactment of the law of February 21, 1856, which required the payment into the treasury, to begin at the end of five years from the date of the issuance of the bonds. (Sec. 5, Act of Feb. 21, 1856, p. 1329, L. & N.) This act was expressly made applicable to bonds already issued. The payment was increased from one to two per centum per annum. There can be no doubt of the power of the State to require an increased payment into the sinking-fund, even as to bonds already issued, as such power was expressly reserved. (99 U. S., 700.) The railroad companies did not question the power.

At all events, the bonds outstanding with the exception of the remainder of the $469,000 issued to the E. T. V. & Ga. Co., before the date of this amendatory act, and of the $780,000, issued to the Memphis & Charleston Co., were issued after the passage of this act. For all the purposes of the construction of the Act of Feb. 11, 1852, this Act of 1856, is to be regarded as if it were a part of the first named act. It merely corrected an imperfection, and made the act conform to the original intention.

The learned counsel for the appellants lay great stress upon this imperfection in the original law. (Brief, p. 206.) But this argument is of no avail, unless the Court shall be led by it to conclude that the legislature of 1851–2, deliberately enacted this clause with the full knowledge that it might be rendered nugatory by the failure of the companies to complete their roads. Such a view is not permissible in the construction of any statute. It must be assumed that the legislature meant the statute to be effective in the accomplishment of its manifest, or professed, purpose. A

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provision for the creation of a sinking-fund, and the payment of money or bonds into it, annually, must be presumed to have been adopted in the expectation that that end would be accomplished.

What, then, is the result of an examination of this section:

First. It provides as we have said, a mode of *payment* of the debts of the railroad companies to the State, and the only mode which is provided.

The complainants strenuously deny that this is payment. They are compelled to make this denial. The admission of it would be fatal to them. But the denial is in vain.

The company is required to set apart one per centum (two per centum after Feb. 21, 1856), and invest the amount in Tennessee bonds, which it is to "*pay*" into the treasury of the State. They are to be assigned to the governor, and that officer is to give a receipt for the amount. We are not left to the construction of doubtful terms as to the effect of this "payment," because it is expressly declared, to-wit: "as between the State and said company, the bonds so paid in shall be a credit on the bonds issued to the company."

A "credit" upon what? If the railroad company was indebted to the bondholder, it was not indebted to the State, and, as there was but one indebtedness of the company, there was nothing upon which the State could give "credit." If the company was indebted to the State, it was not indebted to the holder of the State's bonds.

It is a waste of words to argue that the requirement to pay bonds into the treasury, and to receive credit therefor,

is in recognition of an existing indebtedness, to be thus discharged. This relationship between the parties is plainly expressed.

The alternative is, that the company may be required to pay twice. Appellants' counsel argue that the State—their trustee, is to act as the agent of the railroad company in making payment of the debt from the fund thus accumulated. This would be an anomalous position for a trustee. We sometimes hear of a trustee dealing with his *cestui que trust*, and the Courts hold such dealings voidable; or, we hear of him dealing for himself with the subject of the trust, and the Courts hold such dealings void. Here, we would have the trustee acting as trustee upon the one hand, and as agent for the adverse party. It is quite possible that a legislature could create such a relationship if it should try, but it is quite certain that no legislature ever tried to do so. At all events, if it was done in this instance, it is the first one on record.

The Act of Congress of May 7, 1878, establishing a sinking-fund in the treasury of the United States for the payment of the Pacific Railroad bonds differs from this act in this: Under this act the payment made into the State treasury entitles the company to credit for the full amount paid, at the time of payment. Under the Act of Congress, the fund is to be held by the government, and applied by it to the payment of the company's indebtedness to the government, at the maturity of the bonds. But even under the Act of Congress, the payment of this fund into the treasury would, at that time, become a credit to the company, under the operation of the law. No one would claim that, if the fund were lost, th

company would be required to bear the loss. Nor have the holders of the Pacific Railroad bonds any interest in the sinking-fund, or in the lien of the government upon the roads. The whole transaction, as we have elsewhere seen, and as is plain from the several acts of Congress relating to these roads, is between the government and the railroad companies. The only exception to this statement, is that which is created by the 8th Section of the Act of May 7, 1868, which provides for the protection of the interests of the holders of bonds issued by the railroad companies themselves, and which had been given priority over the government bonds. This exception is not material in this discussion.

The "credit" provided for by this section, is, therefore, a credit on the account between the State and the company—an account of bonds loaned. The company was charged with the bonds when they were delivered to it. Now it is credited with this payment into the treasury. And, as the payment thus made is a credit upon the bonds so issued to the company, it is necessarily a credit likewise upon the lien, and to that extent a discharge of the lien constituted by the bonds when issued. It is a payment, *pro tanto*, of the debt; and to the same extent, a discharge of the security reserved and created for it.

Second. This section establishes the right of the company to make the payment secured by the statutory lien in any bonds of the State. The entire length, breadth, height and depth, of the appellants' complaint as to the settlement between the State and the non-foreclosed roads, is that payment was made in this way, and, in point of time, somewhat in advance of maturity. But, attention is called to the pro-

vision here for the purpose of showing that such payment is absolutely inconsistent with the theory of appellants as to the nature of the statutory lien.

The bonds paid in secure the credit, whether they are bonds which were issued to the company or not. We have called attention to the fact that, in the original act, no means were taken to enable even the State's officers to distinguish the bonds issued to any company from those issued to any other.

The only difference in the mode of dealing with the different classes paid in is, that the bonds paid in by any company which had been issued to that company, are to be cancelled. There could be no object in retaining them. They are *functus officio*. Bonds thus paid in by one company which had been issued to another, are to be retained, and "held and used by the State as a sinking-fund for the payment of the bonds issued to the company."

The company which has paid them in has no further interest in, or concern about, them. The State is to use them, and the State is to pay its own bonds with the proceeds. The reason that they are not cancelled is that the company which received them, still owes the State for them, and must pay the State an amount equivalent to the interest upon them. They are preserved as evidence of that continued obligation.

Nothing could be more simple and natural than this provision, and the effort of complainants' counsel to make it appear mysterious and confusing, is necessarily futile.

It is quite true that the statute could have been so framed as that all bonds paid in should be at once can-

celled, and this without impairment of the lien of the company to which the bonds had been issued, but which had not paid them in. But it was reasonable and proper to preserve the bonds themselves, and to receive the interest payments, and to preserve the evidence which the bonds afforded. It was a business-like mode of transacting this business.

This is the only construction that can be put upon this provision; for in no other way can it be conceived that the State could hold and use its own bonds, so paid in, as a sinking fund for the payment of the bonds issued to the company, not being the identical bonds so to be paid. It is, in legal effect, an expression of the obligation thus assumed by the State, that, in consideration of its own bonds thus paid to it, but of a different issue, the State itself will, as to the bonds originally issued to the company, undertake to provide for their payment, without looking further to the company to which they were issued. Whereas, before, as between the company and the State, the former was bound to provide means for the payment of the principal and interest of the State bonds loaned to it, now and hereafter, the State agrees that, as between itself and the company, the latter has relieved itself of that obligation, by this payment into the sinking fund, and the State will therefore substitute itself for the company in that obligation, and will itself, out of its own means, with which, otherwise, it would have been obliged to provide for the redemption of the bonds it has now received into the sinking fund, make payment to the holders of its outstanding bonds originally issued to the company. And, by this arrangement, the holder of these bonds is as much bound as the company. It is as much a part of his bond, that it may be paid in this way, so far as the com-

pany to whom it was issued is bound to provide for its payment, as if it had been written in the bond itself. So that payment of the bond, as between the company and the State, by means of the sinking fund, is payment of the bond also as between the company and the holder, so far as the latter had any claim against it or upon its property. In other words, it is payment to all intents and purposes, and as against all parties and holders. If the arrangement for indemnity was between the company and State only, then its satisfaction is final and conclusive. If the holder of State bonds was a party to it, and entitled, therefore, to share its benefits, then, equally, he is a party to this provision for its satisfaction, and shares also its burdens.

The supposition that the bonds of the State paid by the company into the sinking fund remain the property of the company, deposited as additional security to meet its obligation to pay the outstanding State bonds originally issued to it, and that its property in the former and its obligation as to the latter remain unchanged, until there has been by the State an actual payment or disposition of the sinking fund bonds and the application of their proceeds to the actual redemption of the bonds for the payment of which they are deposited, is inadmissable. It is so, in the first place, for a reason already stated; that the language of the provision is inconsistent with that supposition. That language declares that the sinking fund bonds shall be paid into the treasury and assigned to the governor. That extinguishes the title of the previous holder, the company paying them; and also the obligation of the State upon them, because the State has become thereby both obligor and obligee, the owner and holder of its own promises. It

is further declared that the payment of these bonds in that manner into the treasury of the State, as between the State and the company, shall be a credit on the bonds issued to the company. The only vitality remaining in the sinking fund bonds is, that, as between the State and the company to which they were originally issued, if they be of that description, that company is bound to provide means for their payment, upon the security of the lien upon its road reserved for that purpose. If they be bonds of any other description, as to which the State has no resort to any other party, then they are to be held and used by the State as a sinking fund, by actual payment when due of the other bonds issued to the company depositing them, for which they are substituted. In that event, the State will owe, at their maturity, to the sinking-fund, if that be regarded as a separate entity, at the maturity of the bonds to pay which it was credited, what the sinking fund owes to the holder of these bonds. But the sinking fund is the State itself, and all parties have agreed that it shall be; so that the last resolution of the argument is, that the railroad company has performed its full statutory obligation, by making its proper contribution to the sinking fund; and the holder of unpaid State bonds, having agreed to that mode of liquidation, assumed whatever risk, if such an idea admits of legal toleration, that the State would perform the obligation, which it had assumed, to apply the money in its treasury, represented by the sinking fund bonds, to the payment of the outstanding bonds, for which the sinking fund is pledged. The utmost that can be said or claimed on behalf of the holders of unpaid State bonds, now suing, is that they bought and hold their bonds on the faith and security of an honest and

faithful observance and enforcement of all the statutory provisions made in the internal improvement acts, looking to their redemption and payment. But it was of the essence of these provisions that the railroad companies, by this sinking fund provision, should have the right to discharge all their obligations in respect to them, by payment to the State of an equal amount of its own bonds of any description, and without discrimination.

This view is not affected by what was said by the Supreme Court of the United States, in the *Sinking Fund cases*, 99 U. S., 725—that the facts that the secretary of the treasury was made the sinking fund agent and the treasury of the United States the depository, or that the investment is to be made in the public funds of the United States, did not make the deposit a payment of the debt due the United States. There is no likeness nor analogy between the character of the sinking funds in those cases and the one in this. In those, there were other creditors besides the United States, who had acknowledged liens, prior to that of the government, and the sinking fund was created for the avowed benefit of all the creditors, including the United States, according to their respective priorities, according to the principles of equity. (Section 8, p. 715.) The bonds belonging to the fund were to be stamped, so as to show that they belonged to said fund, and that they would not be good in the hands of other holders than the secretary of the treasury, until they shall have been indorsed by him, and *publicly disposed of, pursuant to the act.* (Section 3, p. 713.) And the right of creditors to pursue their remedies was reserved, so that it was declared that the provisions of the section should not operate to excuse the companies from the duty of discharging,

of other funds, its debts to any creditor *except the United States*. This exception proves that, as between the companies and the United States, the payment into the sinking fund, if not a present payment of the debt, would, nevertheless, be an excuse, when the debt became due, which would avail the company to exonerate it, to the extent of the sinking fund paid and accumulated, from the duty of paying to the United States an equal amount of the debt due to it, in any other manner.

Third. In view of this provision of the law for a sinking fund, it is immaterial whether we regard the lien reserved in the act, as vested in the State for its own use exclusively or in trust for the holders of its own bonds. In either aspect, the rights of the railroad company to discharge that lien, by payment into the sinking fund, of State bonds other than the very bonds originally issued to it, is equally clear. If the holder of State bonds insists that this statute is part of his contract, and that he has become, by his purchase of the bond, party and privy to the stipulations of the law intended to secure its payment, then this clause, equally with all others, is binding upon him, and payment to the State, in accordance with its provisions, is payment to his representative, and equivalent to payment to himself, and a credit by the State to the railroad company for such payment is a release and discharge by all others in interest. The whole scheme and plan must stand or fall together, and the holder of State bonds, if he would claim its benefits, must submit to its burdens. He has taken his bonds, as he alleges, on the faith of the security and protection furnished by the statute which authorized their issue and

negotiation; but that very statute declares, in this section, that payment to the State, by the railroad company of any State bonds, shall be a credit, as between the company and the State, on the very bonds issued to the company, but which he now holds. He retains his bonds, and the obligation of the State to pay them.

SECTION 8. This section is of but slight importance in this discussion, but may be referred to as showing the intimate business relations between the State and the railroad companies, and as cumulative evidence that no other party was supposed to be interested. It provides for detailed reports of the operations and condition of the roads, but their reports are to be made only to the State. They are to be laid before the governor, who is required to lay them before the legislature "for its action."

SECTION 12. This section is as follows:

"That the State of Tennessee expressly reserves the right to enact, by the legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interest of the State against any loss in consequence of the issuance of bonds under the provisions of this act. But in such manner as not to impair the vested rights of the stockholders of the company."

It will be necessary to recur to this section, in considering the legislation subsequent to the act of which it is a part. Attention is called to it in the present connection, as showing that it is utterly inconsistent with the idea that the lien of the State was held in trust by the State for the bondholders.

Counsel for appellants have argued that this is but the usual and ordinary reservation of power to alter statutes creating corporations, or conferring corporate power (Brief,

p. 224). But this is a mistake. This statute does not create a corporation, or confer corporate power. Nor does this section relate to any corporate power. It relates to a single subject matter, to-wit: "such laws as may be necessary to protect the State against loss" in consequence of the issuance of bonds. This could only relate to the mode and manner in which the lien of the State should be managed and enforced. In the light of the decision of this Court in the Sinking-Fund cases, it is clear that the power thus reserved extended to the adoption of all laws providing remedies to the State which it would have been proper to adopt as part of the original act, and, at all events, would apply to and authorize changes in all matters of regulation which were actually legislated upon in the original act. This would include changes in the sinking-fund created by the seventh section, and in the provisions of the fifth and sixth sections, touching sequestration of the income, foreclosure and sale. Everything relating to the remedy of the State for failure of the railroad companies to comply with their obligations, would clearly be open to alteration by amendatory laws. And, all such legislation was to be had solely with reference to the "interest of the State," and the sole "interest of the State," in contemplation was its need of indemnity against "loss on account of the issuance of bonds." There is no allusion to the "interest" of the State's bondholders. The "interest" protected is that of the trustee, while that of the beneficiary is not mentioned. Here, if nowhere else in this statute, would have been made a reference to the bondholder if the security of the lien had been provided for him.

Upon the power thus reserved, there is imposed but one

restriction. That relates to the rights of the stockholders of the companies. As none such are in controversy, that limitation may be disregarded, except as emphasizing the fact that, leaving it out of view the power reserved is unlimited. There is but one way to construe the section. There is no way to construe it away. It stands as an express, positive, and solemn declaration by the State, incorporated into the very body of the original scheme for aiding this system of public improvements, that, while the State had made ample provision, so far as could be then foreseen, for its own security in every contingency, yet, as human foresight was limited and inadequate, it would, in the most ample and self-sufficient manner, reserve to itself power to provide, according to its own discretion, and in view only of its own interests, from time to time, for every exigency as it should arise; and if actual experience should hereafter demonstrate or even give to its legislature ground to suspect that sufficient protection to the interest of the State had not been secured in the original scheme, it should be at liberty to alter, amend, repeal, or add to the existing law whatever provisions it should deem necessary to protect the interest of the State, and secure the State against any loss in consequence of the issuance of its bonds under the act. In other words, that it might deal with the subject of its relation to the railroad companies, as defined by the original act, either as a whole, or in parts, in whatever other or different manner it should thereafter determine upon, without regard to any interest save its own, and without saving any rights but such as had vested in the stockholders of the companies. The rights of the holders of State bonds were not hinted at, and manifestly for two reasons; they had none under the statute, and what

others they had were already secured by the plighted faith of the State. That pledge was given in the bond itself, which, as its obligation was independent of the statute, would not be affected by any alteration of it. But whether so, or otherwise, whatever rights or claims did or might be urged or preferred as resting upon the terms of the law, all were made subject to the absolute and irresponsible control and disposition of future legislation, to be dictated by the State *ex parte sua*, by a consideration alone of merely its own interest and security against loss.

If the idea of property is that of dominion and control for the sole use of the proprietor, with the right to exclude all others from participating in it, then the twelfth section of the Act of February 11, 1852, necessarily assumes and expressly declares that the lien reserved by the State under its provisions is the property of the State. But whether so or not, if the State is a mere trustee for the holders of its bonds, or for itself and its creditors jointly, and is to be considered, in respect to this lien, as acting for others as well as itself, whether it has a mere naked power, or a power coupled with an interest, nevertheless, the conclusion remains, that by the adoption of this provision as one of the terms of the relation between them, the parties have bound themselves to abide by whatever the State, in reference to its own interest, shall choose from time to time, by successive acts of legislation, to determine and decree; trusting implicitly to its good faith to act, whether in its own right or on behalf of others, as the sole security for their own protection. The idea of a duty, fastened by contract, and made unchangeable by a law higher than the will and discretion of the State, that should be specifically fastened upon the prop-

erty, subject to the lien, reserved and imposed upon the action of the State itself, so that it could be followed *in specie*, in the event that the State should fail in the performance of obligations it was unwilling to discharge, is utterly foreign to the manifest purpose of the scheme, and finds no place or warrant in the statute. The very nature of the proposition is such—it is so entirely opposed by every presumption of law and fact applicable to the case—that it would require the proof of demonstration to establish it. And on the other hand, language used to repel such an inference is so harmonious with the natural relation of the parties to such a transaction, that it ought to be allowed to develop its meaning and application freely and fully. This will keep it in accord with the large and public nature of the enterprises, which it was the object and policy of the State to set on foot, and of the dignity and character of the sovereign body who was dictating the terms upon which alone it was willing to deal. In this connection it is not without significance to compare the twelfth section of the Act of February 11, 1852, now under consideration, with the fourth section of the act, passed at the same session on January 15, 1852. In the latter, the legislature, it is declared, shall have power to enact any law that may thereafter be deemed necessary to protect the interest or credit of the State against loss or damage on account of the issuance of said bonds, *and to provide for the more speedy and certain payment by the company of said bonds and interest.* These last words are omitted in the section of the law now under consideration.

No reason for their omission can be assigned, except that the legislative power, upon further reflection, was unwilling

to fetter itself by a limitation which might seem to exclude its right to make a composition with its debtors, if it should turn out that, unable to pay in full, and according to the terms of their obligation, a settlement could be made which would nevertheless be advantageous to the State. Therefore, the twelfth section declares that the legislature shall have the right to pass "all such laws as may be deemed necessary to protect the interest of the State against any loss in consequence of the issuance of bonds under the provisions of this act," whether the effect of such laws shall be also "to provide for the more speedy and certain payment by the company of said bonds and interest," or whether it shall be to release the company altogether from the obligation to pay the principal and interest of the bonds issued to it by paying something else that the State might be willing, and think to its own interest to accept instead, by way of accord and satisfaction.

Thus it is made plain that, while this section would fully authorize and sustain all the legislation which was had subsequent to its date, touching the statutory lien, it is at the same time the most complete evidence that that lien belonged only to the State.

SECTION 13. This section relates to the action to be taken if any company should obtain bonds fraudulently. It provides for the sale of the road, and the payment of the proceeds of the sale into the treasury of the State and the stockholders are made liable for the payment of the bonds, so fraudulently obtained, and "for all other losses that may fall upon the State," etc.

Can it be doubted that the seizure and sale of the rail road under this section, would confer a clear, free and unin-

cumbered title upon the purchaser? Certainly not. Thus a sale, authorized by the original act would free the property from the statutory lien, and place the fund in the treasury to be invested as a sinking-fund, such "as that provided in the seventh section." Meantime, the bonds of the State are outstanding, with possibly more than thirty years to run. An action against stockholders is authorized. Is that an action by the State or by the bondholders? Clearly the former, because the bondholders' debt will not be due for thirty or more years, and the stockholder would be dead before its maturity, and beside, the liability is for the amount of the bond and all other "losses that may fall upon the State."

SECTION 14. This section provides, "that in the event any of the roads, fixtures, or property belonging to any of said roads, shall be sold under the provisions of this act, it shall be the duty of the governor to appoint an agent for the State, who shall attend said sale and protect the interest of the State and shall if necessary to protect said interest, buy in said road or property in the name of the State, and in case said agent shall purchase said road for the State, the governor shall appoint a receiver, who shall take possession of said road and property, and use the same as provided for in the fifth section of this act," etc.

After such sale, can it be contended, that the holder of internal improvement bonds originally issued in aid of its construction, would still have any lien upon the road and property, now vested in the State? Can the State be trustee of a lien for another on its own property? Is not the supposed lien, if it previously existed, merged into the new and larger title? How can this provision of the law be dealt with sensibly on the supposition that such a lien ever existed?

Let us advance the supposition one step further. Suppose, after such a purchase by the State, the legislature au-

thorizes the resale of the road to other purchasers, free of incumbrances, and such resale is made, does not the title pass, discharged of the original lien reserved by the Act of February 11, 1852, on account of State bonds issued to the company which constructed it? There can be no reasonable doubt about this. The very object of the proceeding to enforce the lien is, by disincumbering the property, to realize from the proceeds of its sale a sum with which to discharge the lien. The lien is a charge upon the property originally, and confers the right to have it sold for the purpose of paying the debt secured by the lien. The very right which constitutes the lien is the right to sell, free from the lien. In the case of *Woodson vs. Murdoch*, 22 Wall., 357, it was decided that the provision of the constitutional ordinance of Missouri, which declared that no sale of the indebted railroad should be made without reserving a lien upon the property and franchises thus sold, *for all sums remaining due*, could not be held to apply to the unpaid remainder of the original debt, but only for deferred payments on account of the purchase money for that sale. The Court say, p. 370:

"By that ordinance the legislature was authorized and directed to sell the railroads on their failure to pay a tax levied, and when the sale should be made to others than the indebted companies, no limitation was directed to be affixed to the price, and such a sale, we have no doubt, would have discharged the road from the State's lien. The State itself was empowered to become a purchaser at the sale, at any price at which it could buy, and whenever it purchased, *the lien, of course, was merged in the title*," etc. 37 Mo., 129.

This being so, the State is at liberty to sell the road, on any terms it deems best, and to accept in payment whatever it agrees upon with the purchaser, cash, its own bonds, or any other property or value whatever. So that, whatever

was the nature of the original lien, whether for the benefit of the State alone, or as trustee for others, it was subject to its sole control and management; though the true result of such a conclusion is, that the lien, from the beginning, was not only in the name of the State, and subject to its exclusive control, but also for its own use and benefit, and not in trust for others.

The feature of this scheme, by which the State bonds, issued for various purposes and to numerous railroad companies, were made equally interchangeable for the purposes of the sinking-fund, and in payment of the debts due on account of them from the companies, to which they were originally issued, ought not to occasion surprise. It was quite proper and suitable that the State should be indifferent as to the descriptions of any of its own obligations, in which any of its debtors might choose to make payment of debts due from them to it. It would have been quite strange if any discrimination had been made. There was no reason why the State should set a greater or less value on any of its own promises to pay; and there was just as little why it should make any difference in its estimate of the comparative value of the securities it held from the railroad companies for its indemnity. It regarded all alike, with equal favor and equal suspicion. It loaned to none which it had not satisfactory reason to believe and expect would be abundantly able to meet all its engagements easily and promptly. It loaned to none without exacting, with care and scrutiny, the same provisions of security. The recipients of its favors were selected by name, because the enterprises and improvements they were charged to execute were deemed to be of such public utility as would render them a safe security for the propor-

tion of capital required for their construction, to which the aid of the State was limited. That aid was not advanced, until previous investments of private capital had prepared and advanced the work to such a stage that the means furnished by the State, necessary for its completion, constituted but a fraction of the whole cost, and yet was made first in the order of security. Every guard against mistake, miscalculation, ignorance and fraud, that could reasonably be required, was carefully provided, and the legislature of the State could not, without convicting itself of folly or indifference to the public good, assign any reason in law why the obligation of all the the companies to which the State bonds were authorized to be loaned should not be regarded and treated by it as entitled to equal consideration. And when the manifest convenience of all parties suggested that each company should be allowed to settle with the State in any of its bonds, without reference to the purpose for which, or the person to whom, they were originally issued, there was no ground of good sense on which could be founded an objection from the State itself, from the companies authorized so to deal with the public securities, or from the holders of any of them. On the contrary, every suggestion, from every source, pertinent to the topic, conspired to recommend just such a medium of settlement and liquidation. Nothing but subsequent and unexpected events, not in the contemplation of any of the parties, and which, to have anticipated would not have been consistent with the dignity of the State, and the respect due to it from those willing to deal with it, has ever thrown even a doubt upon the expediency and wisdom of the provision. No such doubt can be allowed any weight or influence upon the question of its lawfulness.

Thus far, we observe, throughout this act, repeated, numerous and careful provisions made to prevent losses to the State, anticipated as arising from possible defaults of the railroad companies. Those losses could only arise to the State by reason of its payments of its own bonds to their holders. The possible failure of the State to meet its own obligations is nowhere assumed or admitted. No provision is made in view of its possibility. All the guards and securities devised and framed by the law, have reference to the interest of the State alone, either expressly or by an irresistible implication. The lien in question is taken in its name; that it was for the benefit of any one else is not even emote ly suggested. Nowhere is any allusion made to the interest or security of the holders of the State bonds. They rest upon the pledge of the faith and credit of the State. When the State gave that, it seemed to be thought sufficient; it was, at least, all it had to give. It would, at the time, have shocked every sentiment that governs legislation, to have demanded more. A proposition to require the State to give security for the payment of its bonds, or to covenant that it would hold securities exacted from its debtor, to whom it had loaned them, in trust for the benefit of the creditors of the State, would have been scouted, not only as unnecessary and unaccustomed, but as insulting and discrediting. Nothing is more certain, that a direct and express provision to that effect would have been rejected with uanimous derision and scorn. And yet, we are told, it was actually done; that it has, in fact, crept into the statute, through a lurking ambiguity in a single phrase. It rests not only upon a mere implication, but upon one deduced from but a single expression. The bonds themselves, of the State,

issued to the railroad company, it is said constitute the lien upon its property, so that whoever holds the bonds holds the lien. And yet the same statute declares, that, if the railroad company shall pay to the State, into the sinking-fund, any other State bonds, they shall be a credit as between them, upon the very bonds issued originally by the State to the company; so that, if these bonds constitute a lien, those which are so paid are a credit upon the debt, and a satisfaction of the lien, by whomsoever held. And thus, whether we construe the statute literally, or rationally, the same conclusion follows, and takes from the complainants' case its sole foundation. The same result follows, if the theory of trust should be sustained, for payment to the trustee is the only duty devolved upon the company, such payment to be made in the mode pointed out in the original act, or in such laws as the trustee should subsequently enact by virtue of its reserved power, and such payment has been fully made.

The statute thus construed, is consistent with all legislation of the same general character, State and Federal.

No instance can be found in which a State has been found willing to recognize the fact that financial obligations into which it was about to enter required security for their performance. No such legislation by the Federal Government has ever been had. In every instance in which State or Federal bonds have been issued, the faith of the government issuing them has been their sole security. The security taken from the companies when they have been issued in aid of companies, has always been for the indemnity of the government. The South Carolina instance is not an exception to this statement, as the bonds involved in that case were not State bonds. The Florida bonds were not made a

lien, but the company's bonds, issued to the State as trustee, were secured. The act assumed that the State would pay her bonds. The same is true of the statutes of Arkansas, Missouri and Minnessota, and the Pacific Railroad Acts of the United States. The sinking-fund provisions in all of these acts, contemplated payment into the treasury of the government which issues the bonds, and generally authorize payment in any of its bonds.

Subsequent Legislation.

It is not my purpose to enter into detail in the presentation of legislation subsequent to the Act of February 11, 1852. I shall content myself with some general observations upon it.

The amendments to the original act have been numerous. They began in ten days after the passage of the act, and continued at short intervals until the subject was disposed of by settlement with some of the companies, and the sale of the roads of the others. Each and every one of these enactments, in form and substance, attest the perfect understanding of the legislature and people of Tennessee, that the statutory lien was for the benefit of the State alone.

The Act of February 21, 1852, requiring a receipt to be given for the bonds, by serial number, etc., such receipt to be written, and kept in a "well-bound book in the comptroller's office," shows that it was for the purpose of enabling the State to keep its account with the company. The omission of any provision in the original act for the identification of the bonds issued to any particular company is itself of the utmost significance. Read in the light of the agreed state-

ment of facts as to the mode in which the State's accounts were kept, and her interest paid, through the Bank of Tennessee (p. 1034, L. & N.), the importance of this omission is shown to be very great. This statement shows that, at the date of the passage of the Act of 1852, and before and afterwards the Bank of Tennessee "paid the interest on all the State bonds without reference to the purpose for which they were issued." Again, "there was also an account on the books of the bank headed 'interest paid on State bonds,' the object of which was to show the exact amount paid on that account, but it shows nothing as to whom, or for what purpose, the bonds were issued upon which such interest was paid. Three was also an account headed 'railroad companies for interest,' showing the amounts and dates of all payments into the bank of the different companies, but it does not show that the payments were to be appropriated to the interest upon any particular bonds of the State, nor did the bank, in fact, know what bonds had been issued to any named railroad." Substantially the same state of fact appeared in the books of the treasurer of State. The law and the practice of the State being as thus stated, attention was directed to the necessity of adopting some means by which the State could identify the bonds issued to each company, and the Act of February 21st was passed. Then, if not before, it would have occurred to the legislature, that the existence of the lien, as a security to the bondholder should be indicated in some way to the purchasers of bonds, if the bond was to be strengthened in credit thereby. It would have been easy to say, upon the face or upon the back, of the bond, "this bond is issued to the L. & N. R. R. Co., under the Act of February 11, 1852, and is secured by a statutory lien of the property

of the company." This would have been in accordance with common sense, and with the rules and usages of business of this character.

The Act of February 8, 1854, authorized the issuance of State bonds to the extent of ten thousand dollars per mile instead of eight thousand as fixed by the original act. Meantime, bonds had been issued under the original act, upon the basis of eight thousand dollars per mile. This change, assuming its validity, diminished the security of the bonds previously issued, assuming that the lien was for their security at all.

On February 17, 1854, companies entitled to the benefits of the act were authorized to receive bonds upon sections of ten miles, instead of twenty, as provided by the Act of 1852.

By the fifth section of an Act passed February 21, 1856, the amount required for the sinking-fund was increased from one to "two per cent. per annum upon *bonds*" issued to the companies or indorsed by the State for them, which sinking-fund, it is declared, when paid over, the governor, comptroller of the treasury, and president of the Bank of Tennessee shall invest in bonds of the State, and reinvest all accruing interest in like securities, and they were thereby constituted a board of commissioners for the management, goverment, and control of said sinking fund.

By an Act passed January 30, 1856, entitled, "an Act explanatory of the 16th section of the Internal Improvement Law of the State," passed 11th of February, 1852 (and that is the first act that undertakes to explain any part of the Act of 1851–2), the governor is directed to issue bonds to the Memphis and Charleston Railroad Company (a company

which had received bonds under the Act of February 11, 1852), not exceeding $10,000 per mile, upon the terms, conditions, and restrictions required under said Internal Improvement Act. This act declares

"That *the State* shall have a prior lien on said road, stock, machinery, franchises and fixtures for the *amount* of said bonds and interest thereon, as is retained by said State under said acts, and the several acts in force on that subject, or (as) is now held by said State on the said roads for bonds heretofore issued, in preference to all others whatever."

This we regard as an unequivocal legislative construction of the Act of 1852, made prior to the issuance of nearly all of the State bonds now outstanding. This statute, therefore, applies as directly in the determination of the precise question involved here, as the third and fourth sections of the original act, and this act, referring directly to that one, declares that the security is to the State for the "*amount of the bonds.*"

The next important amendment is that of March 20, 1860.

According to the terms of the seventh section of the Act of February 11, 1852, the bonds purchased for the sinking-fund constituted a credit on the bonds to be redeemed, but the annual percentage payable into the fund was changed from one per cent. under that act, to two per cent. under the fifth section of the Act of February 21, 1856, but no change was made in the amount of annual interest required to be paid by each company on account of State bonds issued to it, notwithstanding the statutory credit to which it was entitled, or the amount of the debt. Under the former act the investment was to have been made by the companies; under the latter by the board of sinking-fund

commissioners. No payments were made under the original act, the first instalment of the fund not falling due until in 1858, and but one instalment could have been paid under the amendment of 1856, prior to the passage of the Act of March 20, 1860, entitled an act to provide for the equalization and investment of the sinking-fund on the bonds issued to or indorsed for railroads in this State.

That act provides:

1. "That the money or the bonds that have heretofore or may be paid by cities or railroad companies in this State to the sinking fund commissioners by the 1st day of January, 1860, together with the accruing interest thereon to that date, *shall be passed directly to the credit of the party having so paid the same, and be a release to said party for that amount on the debt due by them to the State of Tennessee.*

2. "Said bonds shall all be cancelled by said commissioners; if indorsed bonds, after cancellation, shall be delivered to the company whose bonds they are, taking a receipt therefor; if State bonds, they shall be cancelled and filed in the office of the secretary of State."

3. The annual payments into the sinking-fund are increased from two to two and one-half per cent. on the amount of the bonds issued or indorsed by the State for each company, to be paid in equal instalments, in April and October, beginning five years after the date of said bonds.

4. "Said companies or corporations may pay said sinking-fund in cash, or in *the like character of bonds*, that may have been issued or indorsed by the State for said company, at their face or par value."

5. If paid in money, the commissioners shall invest it immediately in the bonds of the State, and shall have the same cancelled and filed, as heretofore provided. Such bonds are to be *of the same character* as those issued to such company or corporation.

6. The sinking-fund, when paid, in all cases, shall be passed directly to the credit of said company or corporation, and *be a release to said company or corporation from that amount due by them to the State.*

7. Each and every railroad company or city corporation shall provide interest semi-annually, as now provided by law, *on the amount of bonds unpaid at the time said interest falls due, and not on the original amount issued to, or indorsed by the State for, said company, as heretofore provided.*

8. The comptroller of the State shall keep a regular account against each company or corporation, charging them with the amount of bonds originally issued to or indorsed for said company or corporation by the State, and crediting them by the amount of sinking-fund paid, and shall furnish the treasurer of the State a statement of the amount due by each company or corporation, on the first of June and December of each year that he may know how much interest each company or corporation has to pay.

8. The commissioners of the sinking-fund shall cancel all bonds of the State, as soon as paid in or purchased, by cutting out the governor's and secretary of state's names, and so defacing each coupon that it can not by possibility be used or circulated, and shall file the same in the secretary of state's office.

10. This law shall be in full force from and after its passage, and shall repeal all laws in conflict with it, but shall not be construed as otherwise to affect any law on the subject of the sinking-fund, or the payment of interest due on State or indorsed bonds.

We cannot be mistaken in supposing this to be a most important piece of legislation. Nor is it ambiguous Its

meaning is entirely clear, and is expressed with so much directness and plainess that it can scarcely be made more intelligible by amplification.

The ideas that it contains are, so far as we are now concerned with it, these:

1. That every payment into the sinking.fund is an immediate payment, to that extent, of the debt due by the companies on account of bonds issued to or indorsed for them respectively; and reduces, to a corresponding amount, the annual interest payment with which, on account of that debt, they are severally chargeable.

2. That the payments into the sinking-fund may be in other State bonds than those issued to or indorsed for the company making them. The only limitation as to the State bonds that may be used for making such payments, is that they shall be *of like character* to those issued or indorsed for such company. As the bonds of the State differed as to the rate of interest which they bore, in different issues—a difference quite material in settling accounts, in which they were to be used at their face or par value—we suppose that the criterion for establishing similarity of character required by this statute, would be identity as to the rate of interest. But the only material circumstance to the present argument is that the bonds required for the sinking-fund were not required to be part of the very bonds intended to be redeemed, and yet were to have precisely the same effect in the reduction of the debt as if they were the very bonds themselves.

3. This necessarily assumes that the debt due from the railroad companies to the State, on account of bonds issued to them, and on account of which the lien is reserved

to the State, is a different debt from that due to the holders of the State bonds so issued. It differs not only in respect to the parties, but may also differ in respect to the amounts that at any particular time, or from time to time, may be due. A railroad company may by payments into the sinking fund of State bonds, other than the identical bonds issued to it, largely reduce its liability to the State, on account of them, while the whole original issue still remains outstanding, on which the State is bound as obligor. In other words, it is plain that by these provisions the transaction between the State and the railroad companies and their relation to each other, is the sole subject of regulation; while that between the State and its own creditors, holders of its own bonds, stands quite independent, and rests upon the footing of the contract as expressed in the bonds themselves, as in other cases of State bonds, without other security than the faith and credit of the State itself. And this Act of March 20, 1860, most unmistakeably proves, that it was considered by the State and the railroad companies that the former was at liberty by such legislation, to provide for the public interest, in respect to the State debt, so far as the railroad companies were concerned, without consulting the wishes, or the interest, or obtaining the consent, of the holders of State bonds.

It is not necessary to make a further examination of legislation subsequent to the Act of 1852, to show the understanding of the legislature, and the people, and all interested in the bond-legislation of the State, as to the control of the State over the lien upon the railroads.

If the original act bears the construction for which we contend, no further question need be discussed. If how-

ever, the contrary construction should be established, there would remain the question of

The Validity of the Act of March 20, 1860, and Subsequent Acts.

If the validity of the Act of March 20, 1860, be established, it establishes, *ipso facto*, the validity of all later acts by means of which the State dealt with this security. For if, by consent of the legislature the railroad companies may lawfully discharge their liability incurred by the issue to them by the State of its bonds, from time to time, by semi-annual payments in State bonds other than those issued to them respectively, why, with the like consent, may they not discharge that liability by a single payment in full in bonds of like character, but other than those issued to them? No sufficient reason can be assigned which forbids it; and yet this is the whole of the present complaint.

Can any reason, then, be given against the validity and effect of the act of March 20, 1860?

The question is, whether it is within the scope of the power reserved by the twelfth section of the original act of February 11, 1852; that is, this is the form of the question, on the supposition that we yield the construction of that act upon the point that the holders of State bonds under it are beneficial owners of the State lien. For if not—if they have no such interest in maintaining rights claimed under the original act—then they have no interest to be heard against any amendment or alteration. But, upon the assumption that they are entitled in equity to assert the lien of the State, as defined by the original act, subject, of,

course, to all its qualifications and limitations and other reservations affecting it, then the question is as we have stated it, whether the act of March 20, 1860, is within the scope of the power reserved by the twelfth section of the act of February 11, 1852.

That it is embraced within the limits of that reservation, if there are any that can be judicially defined, we think, admits of no reasonable doubt. For its office is merely, with more clearness, distinctness, and efficacy, to enforce provisions already contained in the original act. It adds and confers no right, which was not already contained in the original statute. The seventh section of that act, as we have already seen, makes it the duty of the company, to which the State has issued its bonds, to pay annually into the State treasury one per cent of the amount thereof, which shall be used in the purchase of State bonds, but of what character and description is left to the choice of the company which makes the purchase, and those bonds so paid in, it is expressly declared, "*shall be a credit on the bonds issued to the company*," as between the State and said company. The bonds so paid in and the interest accruing thereon shall be held and used as a sinking-fund for the payment of the bonds issued to the company.

The act of 1860 more specifically executes these directions, and nothing more. It increases, indeed, the amount of the annual contribution to the sinking-fund, from one per cent. to two and a half per cent of the amount of the bonds originally issued. It makes the bonds purchased by that fund, a credit to the company on the bonds issued to the company, as between it and the State, by releasing the company from that amount on the debt due by it to the State,

and cancelling the bonds so paid in, and requiring, thereafter, the company to provide interest semi-annually, only on the amount of bonds unpaid at the time said interest falls due, and not on the original amount issued to it, as theretofore required; which amount, for which interest is to be provided by the company, is to be ascertained by the comptroller of the State, by charging it with the amount of bonds originally issued to it, and crediting and deducting from time to time the amount of the payments into the sinking-fund, which statements are to be furnished to the treasurer of State, twice a year, that that officer may know how much interest each company has to pay.

The policy of this statute was wise and beneficial. Its purpose was to provide means for effecting a reduction of the public debt. Its motive was to improve the public credit, and its effect would have been advantageous to the public creditor, by enhancing the market value of his securities.

We are only concerned, however, with the question as to its validity.

The meaning of Section 12 of the statute is as broad as language can make it. And it is not to be limited, except by some evident legal necessity. In *Woodson vs. Murdoch*, 22 Wall., 350, the Supreme Court of the United States decided that the power of the State over the debt due to it from the company, on account of bonds loaned to it, implied from the mere fact of the ownership, was so great and ample, that it was not to be taken away by the constitutional ordinance which prohibited the legislature from releasing the lien for any purpose whatever; so that the State might, in the exercise of its sound discretion as a creditor, compound

with its debtor for a less sum, and payable in other bonds, and that the lien would, by operation of law, be thereby discharged.

Speaking of a similar reservation of power, the Supreme Court of the United States, in *Sinking-fund Cases*, 99 U. S., 720, said:

"We are of opinion that Congress not only retains, but has given special notice of its intention to retain full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power."

And again (p. 721):

"Giving full effect to the principles which have been thus authoritatively stated, we think it safe to say, that whatever Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment."

And accordingly, in these cases, it was held, that where a debt had been previously contracted, when no provision of law required the accumulation of a sinking-fund to meet its payment at maturity, that requirement might be superadded to the original obligation, under the authority of such a reservation of legislative power. Of course, legislative power itself has its limits; and they apply to such a reservation, as they do to the original exercise of it; but not, to a greater extent. The only barrier against it, is that of a right already vested, which is protected by the fundamental principle of all rational government, that no man shall be deprived of life, liberty, or property, except by due process of law.

The case of the complainants and their co-bondholders can not be brought within that exception, even on the sup-

position that at the time their bonds were issued and negotiated, the lien, reserved under the act of February 11, 1852, was vested in the State in trust for them jointly with itself. For, so far as it was conferred, it was not absolutely and unconditionally executed as a property right, but *sub modo*, subject to the purposes and provisions of the act, and subordinate expressly to this very provision, reserving to the State, the power to alter the original provisions of the act, as experience of its necessity might suggest, and in order more perfectly to provide for its own interests. If the statute and the transaction constituted a contract between the State, the railroad companies, and the bondholders, one of its stipulations was, that the State might alter its terms, as its own interests, upon its own interpretation of them, should demand. A contract of that character, however anomalous as between private persons, is neither unusual nor unreasonable, when the negotiation is with a political State. The irrefutable presumption of the law, required by the highest considerations of public policy in such cases, is that, the exercise of its discretion will be governed only by motives of public duty, and that these can never lead to wrong, injustice, or oppression.

We have called attention to the fact that the Act of 1852 is not an act creating a corporation, or conferring corporate power. The citation of authority, therefore, showing the construction which this Court has placed upon the reservation of power to alter, amend, or repeal, such acts, is totally irrelevant. This reservation relates to this lien, and, upon the assumption that the lien was for the benefit of two parties—the State and the State's bondholders—the reservation entitles one of the parties interested to change the

terms and conditions of the lien, and the mode of its satisfaction, as that party may see fit, having reference only to its own interest.

The protection given by the Constitution of the United States is to "vested property, or rights of property." The complainants certainly had no interest in the railroad property unless they were beneficiaries of the lien, and if they held that interest, they held it *ab initio*, subject to the clearly declared power of the State to change the characteristics of the lien, and the time and manner of its enforcement.

There is a wide distinction between the facts of this case, as applied to the immediate question under discussion, and those involved in *Hand vs. R. R. Co.*, 12 S. C. There, the State, under a reservation similar to the present one, waived the lien by a subsequent act, in favor of another issue of bonds by the company itself.

The Court having declared that the statutory lien secured the holders of the bonds, held that this attempted waiver could not be sustained. In the present case, there has been no waiver of the lien, but the enforcement of it, with modifications which do not change its substantial character.

An examination of the reasoning of the majority of the Court in that case, will show that it cannot be applied to the present case, and that its correctness is open to grave doubt, as applied to that one. The Court say:

"There are but two constructions that can be put upon this section, namely, that it does not affect the bondholders, or else that it is a reservation of unlimited power against them, and, in the latter case, it would include the right to cancel the obligation of the State."

This conclusion does not follow. We respectfully suggest, even if the premises be correct, the liability of the State as an indorser of the bonds of the railroad company is not the matter to which the reservation of power relates. The subject of that reservation was the obligation of the railroad company. Nor is it accurate to say that, because the legislature reserved the right, in general terms, that it must be held to have no effect, or otherwise unlimited effect, as to the power of the State in dealing with the lien. The language of all statutes must be "restrained unto the fitness of the matter," and this statute can be given ample effect by conferring upon the State the power to change the conditions of the lien without holding that it gives the power to destroy the debt secured by it.

The war defeated the accomplishment of the purpose of the Act of March 20, 1860, and of the 7th Section of the Act of 1852. The railroad companies ceased to pay because they were unable to pay. The railroads themselves were practically destroyed. (See agreed statement, p. 1069, L. & N.) At the close of the war, the State was called upon to deal with the subject in its changed aspects. The public debt had largely increased, by reason of unpaid interest. The people were poor. The railroad companies were generally impoverished, and the roads had to be re-built and re-equipped, with new capital. Otherwise, the lien, no matter to whom it belonged, would be valueless.

At this juncture, the settlement with the Louisville & Nashville Company was made. That settlement was made November 17th, 1865, under the joint resolution of May 5, 1865. (L. & N., p. 69-72).

The debt of the company amounted, at the date of settlement, to $707,631.25, of which $560,500 was the principal, being the par value of bonds issued to it. The commissioners appointed to make the settlement—the comptroller, the secretary of State, attorney-general, and commissioner of roads, reporting the proposition of James Guthrie, the president of the company, to pay the amount in six per cent coupon bonds of the State, say:

"Believing it to be manifestly for the interest of the State to call in this large instalment of its indebtedness, and believing, moreover, that the company had a right, under the law regulating the sinking-fund, to pay off its entire indebtedness in the bonds of the State, your commissioners accepted the proposal," etc.

It appears further, from their report, that

"The last instalment of interest, amounting to sixteen thousand eight hundred and fifteen dollars ($16,815), was paid by said company into the Bank of Tennessee, on the 9th day of May, 1861, as appears from their receipt. This was two days after the adoption of the Secession ordinance; but, as the law required the payment to be made to the bank, and as your commissioners cannot see that the status of the bank was changed at that early day, they consider the payment legal. The fact that the fund was lost by the bad faith of the bank does not, in the opinion of your commissioners, furnish any just or legal grounds for recourse on the company."

It is no just imputation upon the good faith of the parties to this transaction, nor to its value, as a measure of liquidation, reducing the public debt, and establishing a precedent for its gradual extinction, upon the basis of its par value, that the bonds of the State, which constituted the medium of payment, were purchased at a considerable discount. Neither the Louisville and Nashville Company, nor any other railroad company of the State, was responsible for

the depreciation of the public securities. The State suffered no injustice in receiving from its debtor its own obligation at its standard value. It was relieved of that much debt, and collected an asset, by the operation, at its full value. The holders of the bonds bought to make the exchange were willing to sell at the market price, and are not those who now complain. The holders of other State bonds can not justly object to the transaction, for they chose to retain their holdings, which were improved in market value by the new demand and use. In every way in which it can be viewed, it was a beneficial settlement. Its striking advantage was an example and precedent. It opened a way in which the debtors of the State, otherwise unable to pay, would be enabled, notwithstanding their poverty, to relieve the State from the intolerable burden of its increased debt, by a reduction which would bring it again where the annual exactions on account of its interest would be within the limits of a rate of taxation which the people could, without oppression, sustain. It did no one injustice. It was strictly in accordance with both the letter and spirit of the law in force when the bonds were first issued.

The Funding Act of November 23, 1865.

This act provides for a new issue of six per cent. coupon bonds of the State, to be dated January 1, 1866, payable January 1, 1892, to an amount sufficient to pay off all bonds and interest past due, as well as that to fall due January 1, 1869, or any bonds that may fall due during the year 1867, issued or indorsed by the State prior to the Act of Secession of May 6, 1861, to be sold, exchanged, or negotiated, at not

less than par, or exchanged for the interest coupon intended to be paid, at par.

It was also thereby enacted (section 4),

"That the amount of interest now due, or that may become due by January 1, 1866, by any railroad company to the State, on bonds issued to or indorsed for said company, shall be charged up to said company, on the same terms and conditions of the original loan under the law this is intended to amend, and the State shall have the liens upon each of said roads, their franchises, and property, for the prompt and faithful payment of the principal and interest of the bonds hereby authorized to be issued to pay the interest on the bonds said company should have paid interest on, as it has under the law this is intended to amend, for the bonds issued under that law."

It was also enacted that the several railroad companies receiving aid under the act should pay the interest as it matured on said bonds, as they were required to do in respect to the bonds originally issued to them, commencing June 15, 1866.

The law requiring payment of the two and one-half per cent. per annum sinking-fund was suspended until January 1, 1867, from which time four per cent. was required.

The arrangements and provisions of the statute are very simple. The holder of overdue bonds or coupons surrenders them in exchange for new bonds at par. The amount of arrears, chargeable against each company, is readily ascertained, so that as between the railroad companies and the State the accounts are easily adjusted. For the amount of these new bonds issued on account of railroad companies, a lien is reserved as under the original act for the original issue, or, rather, the original lien is extended and enlarged so as to embrace this new debt. *But it would happen, almost*

of necessity, that overdue coupons surrendered by particular holders would be from bonds originally issued to many different companies, secured to the State by as many different liens. For these coupons new bonds would be issued, each of which would represent a fraction of the debt of many companies. On which railroad would the lien of such a bond rest? Or, rather, on how many? How will the holder apportion his security? Here is confusion, worse confounded, the moment we depart from the simplicity of the transaction, separated into two distinct parts; one between the State and railroad companies, by which a lien is reserved on the property of each for the amount of its liability; the other, between the State and its creditors, in which the whole obligation is expressed in the bond, which constitutes its security.

The complainant and his associates, and his and their predecessors in the ownership of their bonds, accepted the provisions of this Act of November 23, 1865, delivering to the State the overdue and unpaid coupons of said State bonds, which had matured from July 1, 1861, to January 1, 1866, and receiving in exchange therefor the State bonds authorized thereby. (Agreed Statement of Facts, p. 1060, L. & N.) If they say they claim no right to enforce a lien on account of these funding bonds, they surrender the ground of their claim to enforce a lien for their bonds of the original issue; for, by the express terms of the statute, the State has the same lien for the latter issue that it had for the former. *These refunding bonds are not issued to the companies;* so that the lien reserved as against them respectively is not for specific bonds, but for amounts of ascertained debt charged in account and equal to that many bonds. *They are issued*

to holders of unpaid coupons, each one of which was taken from a bond of original issue, no two of which, perhaps, were to the same company, and therefore may represent as many liens as there are coupons. And yet the statutory lien which has been reserved for these, is declared to be the same as that held by the State for the bonds originally issued.

This act attests the understanding of all concerned as to the construction of the Act of 1852. But, the effect of the action taken under it, as shown by the agreed statement, is to estop the complainants from disputing the construction for which we contend.

The attempt by the State to exercise authority to issue new bonds, and to place them upon equality, as to lien upon the companies' property, with those which had been issued under the original act, was an assertion of power to deal with that lien as its own property. The acceptance of the bonds by the holders of the original bonds, was an admission of the rightfulness of the exercise of the power, and, therefore, of the State's title to the security.

The authority so much relied upon by the complainants, upon a branch of this cause to which it is not at all applicable, is precisely in point upon this question, *i. e.*, *Hand vs. R R. Co.* The bonds in question in that case were the bonds of the railroad company, indorsed by the State, issued under an Act passed in 1856.

The Court held that the statutory lien was designed to secure the bonds, and that the State had no power to waive the lien. In 1869, the State passed an act authorizing the company to fund past due and unpaid interest upon the bonds, by issuing new bonds for the amount to the holders of the past due coupons, and giving the new bonds priority

over the first issue. Some of the holders of the original bonds accepted the new issue, and the Court held that they were estopped to deny the validity of the law. The Court says:

"Can the persons taking advantage of the provisions of the third section by presenting coupons for interest, issued under the Act of 1856, and fundable under this section, be permitted to claim and make available, for the payment of the bond and coupons held by them, the original lien or mortgage created by the Act of 1856? To answer the question it is necessary to put a construction upon the provisions of the Act of 1869, as bearing on the continuance of the lien created by the Act of 1856. It cannot be denied that the Act of 1859 is, in effect, an assertion on the part of the legislature of its exclusive control over the lien created by the Act of 1856. No attempt has been made in argument to point out any features of this act that will bear the construction of intending to reserve the rights of bond and coupon-holders under the Act of 1856, where they do not choose to accept the provisions of the third section. Indeed, an opinion of the then Attorney-General is produced, which appears to have been prepared to inform the legislature, while, as a bill, it was on its passage, that holds the control of the State over the lien created by the Act of 1856, to be exclusive and absolute. Two circumstances may be inferred from the opinion, coupled with the language of the act passed—first, that the question of the exclusive right of the State to control the lien acquired under the Act of 1856, was involved in the passage of the act; and, second, that the judgment of the legislature was that such was the nature of the rights of the State, and as a consequence, it could, at its pleasure, destroy or postpone such lien. With this conclusion in view, it is not difficult to put a construction on the intent and meaning of the third section in its bearing on the effect of refunding. It is too clear for argument or the citation of authorities, that one taking a provision made for himself by a statute, must take upon the condition upon which it was offered. This principle equally applies to express conditions, and such as may be fairly implied from the terms of the statute. The Act of 1869 was a contract in its bearing on the rights of all parties who should take its advantages, and,

as such, they are precluded by the principles of legal estoppel from avering against their obligation, voluntarily assumed upon a valuable consideration."

All of this reasoning applies to the present case, and if it be correct, the complainants have no standing in Court.

The Act of January 18, 1866.

This act was for the purpose of providing means to rebuild and repair the dilapidated railroads. The preamble recites that, whereas, the Memphis and Ohio Railroad, the Memphis, Clarksville and Louisville Railroad, the Edgefield and Kentucky Railroad, the Manchester and McMinnville Railroad, the Nashville and North Western Railroad, the Mississippi and Tennessee Railroad, the East Tennessee and Virginia Railroad, the Knoxville and Kentucky Railroad, the Winchester and Alabama Railroad, and the East Tennessee and Georgia Railroad, are all out of repair; the bridges and trestles on said roads have been destroyed, and the companies are unable to put them in running order, and the State has a large interest in said roads, and it is to the interest of the State, and the people of the State, that said roads should remain under their control, and that they should be put in running order.

It therefore authorized a new issue of bonds in aid of these companies, the roads of some of which were in the hands of receivers appointed by the governor, the proceeds of which were to be used in building the bridges, repairing the roads, and putting them in running order.

Each company to which this relief was granted was required to pay four per cent. on the amount of its indebtedness under the act as a sinking-fund, as also the interest on

said bonds, "and the State hereby reserves a lien *on all the profits of said roads for the money hereby advanced* for the repairing of the same, which the State shall have the right to enforce, if the said companies should fail to pay the four per cent. and interest as provided by this act, and which shall be enforced as now provided by law in the Internal Improvement Act of the State, and which this act is intended to amend."

The eighth section further enacts,

"That the lien retained or declared in the fourth section of the act is hereby declared cumulative of and in addition to the lien declared in the Act of 1852, which this is intended to amend, *which lien is hereby declared to extend to and cover the money or bonds to be advanced to said roads under this act.*"

This whole extension of the original lien, so as to cover and secure the State on account of the large additions to its debt, authorized by this act, is intelligible on the ground that the State was dealing as a matter of right, with its own, and the measure was justified in law as in policy, by those considerations of public interest, which, under the twelfth section of the Act of 1852, conferred upon the State discretionary powers, by future legislation, to make additional provisions for its own interest; but how it can be reconciled with the theory that the holders of the bonds, originally issued under the Act of 1852, had a property interest in the security of the lien created by that act, which could not be invaded, weakened, or impaired without their consent, cannot easily be conjectured.

By an Act passed February 18, 1867, the Act of November 23, 1865, was amended so as further to suspend the

law requiring payments into the sinking-fund from January 1, 1867, until January 1, 1870.

On March 7, 1867, an act was passed to amend the charter of the Memphis and Charleston Railroad Company and for other purposes. The preamble recites that a large portion of its railroad was injured and destroyed by the late war, and the company, during the existence of the same, was deprived of the possession and revenues of the road; that since peace has been restored, the company obtained possession of its road, and has created a floating debt on short time, in order to repair the road and put it in running order, and in the purchase of a large number of locomotives, cars, and materials from the United States, and in payment of interest on the bonds of the company previously issued; and that the necessities of its creditors required payment of their dues before they could be realized out of the income of the road. The company was accordingly authorized to borrow not to exceed one million of dollars, for the purpose of liquidating and discharging their liabilities, and in order to secure payment of the same was empowered to issue its bonds, and to secure the same a second mortgage, subject to a prior first mortgage of $1,294,000, "and also reserving *to the State of Tennessee* her priority of a statutory and all liens *in favor of said State for any and all loans made by said State* under the general internal improvement law of said State and all amendments thereto," and "that nothing in the foregoing provisions of this act shall be so construed as to deprive the State of any lien secured by mortgage or otherwise on the entire property or effects of said Memphis and Charleston Railroad Company."

On December 7, 1867, the General Assembly, in pursu-

ance of the policy to revive the railroad property and interests of the people, passed an act providing for additional loans of bonds to various companies, requiring, among other things, that any railroad company accepting its benefits, should also accept a number of directors in its board to represent the State, in proportion to the aid granted. It also enacted (Sec. 15):

"That if the several railroad companies, or either of them, to whom the bonds of the State have been loaned by this act, *or former acts*, shall fail for two consecutive years to pay the interest that may accrue upon the bonds loaned to them severally, then and in that case the governor, secretary of state, and comptroller may, at their discretion, sell said railroad track, railing, rolling stock, etc., *upon such terms and conditions as they may deem best to secure the interests of the State;* and shall retain of the proceeds of said sale the amounts loaned to said companies and the interest due on the same, with expenses of said sale."

This amendment is within the limits of the power reserved by the twelfth section of the Act of February 11, 1852. Its language not merely ignores any proprietary interest in this dominion over the railroad security, on behalf of the State bondholders but excludes the idea. The sale is to be made at the discretion of the State, as to time and terms, and when made, to be on conditions prescribed merely by the interest of the State itself. The sale is to be of the the road itself, and *ex necessiate rei* free of incumbrance, as respects the lien, to enforce which it is made. The purchaser therefore gets a clear title; and the proceeds of the sale, which are substituted for the property sold, and remain subject to the use of the lienholder, are to be retained by the State, so as to cover the amounts loaned by it, with accrued interest and expenses of sale—that is, to the extent of a full and perfect indemnity.

On March 13, 1868, the legislature passed an act to liquidate the debt of the State falling due in 1868 and 1869, being bonds issued in May, 1838, for the establishment of the Bank of Tennessee. The governor, secretary of state, comptroller, treasurer, and the president of the Bank of Tennessee were made a board of finance, and it was made their duty to provide for the payment of so much of the public debt as may require payment within three years from the passage of the act, and to enable them to do so, they were authorized to negotiate such loan as might be necessary, either by a pledge or sale of bonds, to be issued for that purpose.

The act touched the question of the railroad loans, only in one point. The fifth section made it the duty of the railroad companies, at least fifteen days before each instalment of interest on the bonds issued to them respectively becomes due, to deposit with the comptroller of the State a sum of money sufficient to pay such interest, including exchange and necessary commissions under the existing penalties of law in case of failure so to do.

The interest on the State debt which fell due in July, 1868, was paid. On November 10, 1868, the governor, Wm. G. Brownlow, in his message to the legislature, said:

"The six railroads in the hands of receivers, are indebted to the State on interest account due July 1, 1868, one million one hundred and twenty thousand nine hundred and ninety-six dollars and eighty-six cents. The interest of these roads, as well as that of the State, require that they should be sold, and the proceeds thereof be applied to the reduction of the State debt. I would have seized the two other roads, for failure to pay the July interest, and placed them in the hands of receivers, but that I had learned by experience that to do so would only entail increased burdens upon the State treasury. . . . Leading gentlemen con-

nected with unimportant railroads largely indebted to the State, are asking for authority to issue second mortgage bonds, with a view of exchanging them for State bonds. Thus purchasing State bonds by the avails of these second mortgage bonds, the debt now due by the State would, in like amount, be transferred to these railroad companies, and so the State would be relieved of a burden of several million of dollars of debt now resting upon it. I regard this proposition with approval, and advise its adoption by the General Assembly. The payment of large debts now due from the roads alluded to, and the sale of the roads already in the hands of receivers, would reduce the State liabilities at least one-third."

We learn from the brief of complainants' counsel (p. 170), that Gov. Brownlow, at some time had consulted "eminent lawyers and wise citizens," and that he had adopted the view that the State held the lien " in a fiduciary capacity." The language of this message shows the view which he took of this " fiduciary " relation, namely, that the State was called upon to avail itself of the security in payment of its debt. This view was correct, and it was adopted by the legislature, to which it was addressed, for that legislature a lopted

The Act of February 25, 1869.

This was an act for the liquidation of the debt of the State contracted in aid of railroad companies, and embodied the recommendations of Gov. Brownlow.

It recites that, under the general improvement laws of the State, passed from time to time, aid had been granted to various railroad companies, by the loaning of the six per cent. bonds of the State, to enable said companies to iron, equip, build, and bridge, and for other purposes, which is now secured to the State by a first mortgage or lien on the

franchise, property, and fixtures of the respective railroad companies; and that it is desirable, for the general welfare or the State, that the State shall be reimbursed such amounts as have been advanced to the different railroad companies as fast as may be practicable.

It enacts as follows:

1. That the respective railroad companies, or either of them that have created indebtedness to the State, are authorized to repay any amount of the principal of such indebtedness as they have respectively created, in the bonds of the State, in such amount and at such times as may be practicable.

2. That any railroad company or companies, repaying any indebtedness due the State under the provisions of this act, are authorized to issue bonds of equal amount and denomination with the bonds of the State, paid and delivered up for cancellation, as thereinafter provided, which said railroad bonds, so issued in lieu of any equal amount of State bonds, shall be certified to by the comptroller, and entered in a book to be kept for that purpose, with date, number, and amount, and shall be a lien, *pro rata* in amount, and of equal validity and effect with the unretired part of the State indebtedness, upon such railroad and all its property, franchises, fixtures, and materials.

3. That the comptroller of the State shall receive from the railroad companies, or any of them, bonds of the State, in such amount as may be presented, and cancel the same in the presence of the officer or agent of the company paying them, and execute duplicate receipts for the same, and shall certify on the bonds of such railroad company repaying indebtedness due to the State, that the same has been paid,

and *that the bonds so certified are secured by first mortgage*, provided that said railroad companies shall liquidate their indebtedness prior to the maturity of *the bonds that have caused said indebtedness;* and also that said bonds, when executed by the respective railroad companies, or either of them, shall be deposited with the comptroller of the State, whose duty it shall be to deliver said bonds, or any number of them, to the president and directors of the company, on the deposit, by said president and directors, or authorized agent, of *an equal amount of the six per cent. bonds of the State of Tennessee*, with unpaid coupons attached, and the company's first mortgage bonds authorized to be issued by this act shall have no validity or value, except the comptroller's certificate is affixed on the face of the bond, that said bond is executed and issued, and, by virtue of law, takes the place of a bond of the State, and is a first mortgage bond. The duties required of the comptroller were authorized to be discharged by an agent for him, in the City of New York.

4. That, by and with the consent of the board of directors of any railroad company in the State, under the general improvement law of February 11, 1852, and all the amendments thereto, any person or corporation may, by paying the indebtedness of such railroad company to the State, in the bonds of the State, as provided by law, be and are hereby substituted and entitled to all the liens against said company for the payment of said debt that the State had or has by law, and the governor and secretary of State shall give such party or parties paying such indebtedness a certificate, showing the facts, which shall be evidence against the company of such indebtedness to said individuals or corporation.

5. That any person may, with the consent and approbation of any railroad company which is indebted to, and for which the State of Tennessee holds a lien, pay the said debt, so far as the State is concerned, in the bonds of the State, or any coupons of bonds, at par; and the person so paying the debt of any railroad company, shall, upon filing with the treasurer of State the written assent of said railroad company, under its corporate seal, be entitled to have and hold all the lien or liens which the State of Tennessee had or has upon said railroad, or its property, and shall have the same right to enforce the same which the State of Tennessee had, the object and intent being to place the person or persons so paying, with the consent of said railroad company, in the same position and with the same rights which the State of Tennessee had previous to and before said payment, and with full power to enforce the same.

6. That any person who may, with the like consent of such railroad company, pay any part or portion of the indebtedness of such company, shall have, hold, and be subject to all the rights, privileges, and lien or liens of the State, to the extent of, and in proportion to, the amount of such indebtedness, with the same rights and privileges the State now has, to the extent of such payment or payments; provided the passage of the act shall *not decrease the lien of the State upon any railroad of the State*, until the entire claim of the State is fully liquidated, or *affect the interests of the present bondholders of the State;* and provided that railroad companies which have issued second mortgage bonds, availing themselves of the provisions of the act, shall file with the comptroller bonds of the same series as those loaned to such company, for which the State holds a first mortgage lien.

On December 8, 1869, the legislature passed an act, repealing all laws granting State aid to internal improvements, and enacting that no further or additional aid shall be granted or issued to any railroad or turnpike company in the State.

The Act of January 20, 1870.

It enacts as follows:

1. That the act of February 25, 1869, be amended so as to allow any railroad company which may be indebted to the State, by reason of the bonds of the State loaned to it, to pay into the State, in liquidation of the principal of said indebtedness, any of the legally issued six per cent. bonds of the State of Tennessee outstanding, without regard to series or number, and such payment shall, to the extent made, be a full and perfect discharge of the lien which the State holds upon the property of such railroad company, held by virtue of the bonds of the State issued to such railroad company, whether they be the same bonds or the same series of bonds issued to said company, under the act of February 11, 1852, and acts amendatory thereof or not.

2. That railroad companies issuing their own mortgage bonds under the provisions of the act of February 25, 1869, be allowed to fix their own rate of interest, and that when said railroad companies owe interest already due, coupons past due shall be taken by the comptroller or treasurer in discharge of such indebtedness for interest.

3. That when any company, under the provisions of this act, shall pay into the treasury of the State bonds which have been issued by the State to said company, the said bonds shall be cancelled; but should any company, in

discharge of its own debts, pay into the treasury any bonds that were issued to other companies, that may still be indebted to the State, such bonds so paid in shall not be cancelled, but shall be held by the State as purchased bonds, retaining a lien for the State upon the road to which said bonds were originally issued, until the debt of said road to the State shall be fully discharged, when the bonds so held shall be cancelled; provided that the provisions of this act shall not be so construed as to allow the payment and satisfaction of debts created by bonds issued by the State, and *upon which the State is secondarily liable*, nor to the payment of the sinking fund, now required by law of the railroad companies of this State.

In comparing the two statutes of February 25, 1869, and January 20, 1870, we find that their purpose and effect were:

1. To permit the railroad companies indebted to the State, on account of State bonds issued to them respectively under the internal improvement acts, to anticipate the maturity of the debt by paying its principal, as well as interest accrued, in whole or in part.

2. And to do this by paying to the State any of its own six per cent. bonds, without regard to series or number.

The amendment of January 20, 1870, seems to have been made principally to remove any doubt on this point that might be founded on the language of the act of February 25, 1869. That, however, seems sufficiently explicit, whether considered merely upon its own words, as we have seen, the idea was already contained, particularly in the provisions relating to the sinking fund.

The proviso in the eighth section of that act, that it shall not "affect the interest of the present bondholders of the State," can hardly be thought to have created such doubt. As an exception, it is perfectly inert, as there is nothing whatever on which it could operate or take effect. The most that can be attributed to the sentence is, that it may be regarded as the expression of an opinion by the legislature of the possible existence of some interest, and of its desire not to be supposed as intending, in that event, to affect it. Individual members may have had some doubts upon the subject, and caused the insertion of this language out of abundant caution. Or, it may have been believed to be the moral duty of the State to use the security for the protection of the bondholders, in view of the changed condition of the State's credit and ability. In any event, the exception cannot be understood as having been intended to nullify the act itself.

It will be observed that the terms of the Act of February 25, 1869, limit the right of the railroad companies, and of others for them, respectively, to the payment of that debt, which was created by the loan to such company by the State of its bonds; and do not include the right to pay off the company's own bonds, indorsed or guaranteed by the State. This limitation is more explicit in the proviso to the third section of the Act of January 20, 1870, which declares that the provisions of the act shall not be construed to allow the payment and satisfaction of debts created by bonds issued by the State, and upon which the State is *secondarily* liable, etc. It may be thought that there is an inaccuracy here in describing indorsed or guaranteed bonds, as issued by the State; but it is hardly so, for it is in accordance both

with the law and fact, as indorsed or guaranteed bonds were in quite a proper sense issued by the State. The reference certainly is to that description of bonds; for, otherwise it would reduce the statute to a direct self-contradiction, and forbid the very thing it was the chief, if not the only apparent purpose of the remainder of the act to permit. For if the whole object of the statute was not to authorize the payment and satisfaction of debts created by bonds issued by the State, and upon which the State was liable, *other than those merely indorsed or guaranteed by the State*, then it is impossible to impute any purpose to the statute at all.

This leads to a most important conclusion, namely, that, as the State is *secondarily* liable upon the indorsed or guaranteed bonds, it is *primarily* liable upon *all its other bonds issued in aid of railroads* under the internal improvement laws.

3. The further purpose of these two acts was, in case of *full payment* of the debt to the State, in the mode authorized to discharge the lien originally reserved in its name therefor; in case of *partial payment*, by the company, to discharge the lien of the State *pro tanto*; in case the payments are made by others, for the company, at its request, to transfer to such person, by way of substitution, the lien of the State, to the extent of the payments, and to authorize the company to create and secure its own bonds, to replace an equal amount of State bonds, thus to be redeemed and retired and establish by a State certificate that the mortgage given to secure them was the first and best lien on the company's property. The comptroller's certificate was to go forth to the money markets of the world, as a warranty on the part of the State of the validity and value of

these new securities, as having taken the place of an equal number of State bonds, and as first mortgage bonds.

How efficacious these acts were in giving credit to the companies which accepted their provisions, their transactions under them, as disclosed by the records in these suits, will show; and also, how extensive the imposition practiced on the public, in Europe and in this country, with the assistance and acquiescence of the complainants and their associate holders of State bonds, if now these transactions are to be overthrown for invalidity.

The next important act of legislation is the act to fund the floating debt of the State passed February 24, 1870. It provided for funding, in a new issue of six per cent. bonds, not to exceed three millions of dollars in the aggregate, and to be used only at par, the bonds of the State then due or becoming due on or before January 1, 1874; the interest on the public debt then due or becoming so on or before the same date; the bank-notes of the Bank of Tennessee issued prior to May 6, 1861, and outstanding warrants on the treasury. The amount of interest due or falling due by January 1, 1872, to the State on bonds issued to railroad companies, might be paid by said companies in bonds of the State or past due coupons, at their election, provided they had or should pay, in cash, fifty per cent. of the amount of interest due and owing to the State by such railroad companies on July 1, 1869; but this provision was modified by the amendment of December 16, 1870, so as to permit the discharge of the *due* interest of its indebtedness to the State by any railroad company, only in *past due bonds* or coupons of the State.

At this date, nearly twenty years had elapsed from the date of the passage of the Act of 1852. The subject had engaged the attention of the legislature, the people, and the State creditors, and the railroad companies, and had given occasion for the passage of the many acts to which we have thus called attention, and it is plain that, from the beginning to the end of this period, and in all of these transactions, the State dealt with this lien as her own, and that her action was unquestioned. The only hint of a possible interest in any other person or body of persons, is the ambiguous and inconsequential expression in the 8th Section of the Act of February 25th, 1869, and this was nearly four years after the State had formally cancelled the lien as to one of the railroads, the Louisville & Nashville.

Subrogation.

Argument upon this topic in this cause would seem to be forbidden by the decision of the Court in *Chamberlain vs. R. R. Co.*, 92 U. S., 306. Such a claim being made in that case as is made here, the Court say:

"Whatever right the plaintiff had to compel the application of the lands received by the State to the payment of the bonds held by him, *it was one resting in equity only.* It was not a legal right, arising out of any positive law or any agreement of the parties. It did not create any lien which attached to and followed the property. It was a right to be enforced, if at all, only by a court of chancery against the surety. But the State being the surety here, it could not be enforced at all, and not being a specific lien upon the property, can not be enforced against the State's grantees. Where property passes to the State, subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the Courts whenever the property comes under their jurisdiction and control. Thus, if property held by the government, covered by a mortgage of the original owner,

should be transferred to an individual, the jurisdiction of the Court to enforce the mortgage would attach, as it existed previous to the acquisition of the government. *The Siren*, 7 Wall., 158. But when the property is not affected by any specific lien or trust in the hands of the State, her transfer will pass an unincumbered estate."

The same principle was announced and applied by MR. JUSTICE MILLER, in *Tompkins vs. R. R. Co.*, 18 Fed. Rep., 354.

The right of subrogation is part of the remedial system of jurisprudence of the State which recognizes it. As such, it is subject at all times to the legislation of the State. It may be repealed, as any other provision of the law, at the will of the legislature, altogether or in part. It is not a right secured by contract, and is not, therefore, protected by the provisions of the Constitution in that behalf.

Estoppel.

The complainants are estopped to assert the claim which they now make. They are equitably estopped by the following facts, which give rise to the application of the rule that one who purposely encourages another to do an act, or pursue a line of conduct, upon the faith of which another changes his position, so that the declaration of the invalidity of such acts or conduct would work him an injury, shall be forbidden to assert such invalidity.

First: They purchased their bonds without knowledge of even the name of the company or companies to which they had been issued. This was an acquiescence in the assumption of the State and the companies that the latter owed no duty in connection with the bonds except that which it owed to the former.

Second: They paid the same price for bonds issued to solvent companies, and for bonds issued to companies whose property afforded no security whatever. This must have been in ignorance of the law under which the bonds were issued, or upon the assumption that the lien did not secure them. A purchaser of bonds issued in pursuance of the provisions of a statute must be presumed to have been acquainted with the terms of the statute.

Third: They accepted the provisions of the Act of November 23rd, 1865, and availed themselves of its benefits. This act, as has been shown, was an assumption by the State of absolute ownership of the lien. It provided for the issuance, directly to the bondholders, of new bonds, which were to be placed upon an equality with the old bonds as to liens, *and it would be absolutely impossible for any one to know what road would be subject to the lien of any particular bond of the new issue.* The books of the State enabled the State to know the amount of unpaid interest that would be chargeable to each company, being paid by the State to the holder of matured coupons, but as the person surrendering coupons would surrender the coupons of all bonds held by him alike, and receive a single payment, the bond issued to him could not possibly be identified as having any connection with any particular company.

This act also required four per centum to be paid unto the sinking-fund instead of two, as before provided, a sum sufficient to extinguish the bonds before maturity, and authorized such payment in any bonds of the State. Upon principle, and upon the authority of *Hand vs. R. R. Co.* this is an estoppel.

Fourth: The public acts of the State were known to all who dealt in her securities, and, while the State was dealing with the lien as her own, while she was settling and receiving payment from some of the roads and selling others, the State bondholders aquiesced. They acquiesced until new investors came forward, and, upon the faith of these enactments, advanced the funds with which the State was paid, and with which the railroads of Tennessee were re-built and re-equipped.

The case is plainly within the operation of the principles declared in *Chamberlain vs. R. R. Co.*, 92 U. S., 307.

The Foreclosures.

These were proceedings *in rem.* The property affected was situated within the State of Tennessee. That State provided, by legislation, a mode of determining the legal and equitable rights of all interested in the property, which was strictly pursued.

The first act was that of July 1, 1870. This act appointed a board of commissioners to sell the roads.

On July 8, 1870, another act was passed, authorizing the commissioners to lease such roads as they could not sell.

At the next session of the General Assembly, these commissioners reported that they had, in pursuance of this act, proceeded, after due advertisement, to offer for sale, separately, the interest of the State in the several railroad companies contemplated by it, but failed to sell, or to receive a bid for either road. The result was not unexpected. The proposal to sell gave rise to various embarrassing questions of a judicial nature, so, that, in their opinion, before a sale

should again be attempted, farther and more specific legislation was indispensable, providing for a speedy and final determination of the multifarious legal questions affecting essentially the rights of all parties interested in the roads. They also suggest the expediency of selling *on time;* and suggest that the provision of the Act of 1870, which fixed the minimum price of sale at the amount due from each company, was impracticable. They were fully satisfied that the interest of the State in some of the roads—especially the shorter and least valuable—could not be sold for an amount even approximating the debts due to the State.

They express their approval of that feature of the Act of 1870, which secures to the purchaser the right to discharge the amount of his purchase in any of the legal bonds of the State. This provision, they believe, will in no small degree facilitate a sale and serve to enhance the price; and it cannot be of prejudice to the State, inasmuch as it is all the same to the State whether a given amount of its liability be extinguished by the surrender and cancellation of one set of bonds or another. The only conceivable objection, it would seem to them, would be in the mouth of the purchaser himself, and then only in the event that it should be held that the bondholders had a lien on the road. "But this objection," they add, "is of no practical force, if the State shall provide for the faithful discharge of its remaining outstanding bonds as they mature."

The commissioners then proceed to state the various embarrassing questions to be decided before a sale, and among them state, as an important question, as to which there is a wide difference of opinion, this: Have the holders of the bonds issued to a particular railroad company a lien

upon the road and property of that company as security for the payment of such bonds at maturity, or have they no other pledge than the faith of the State?

The commissioners conclude that as to the legal power of the State to provide for such a mode of sale as they recommend, there can be no doubt; and that is the only admissible resort for relief; as the experience of the State with roads in the hands of receivers had amply demonstrated, so that, in their opinion, it would be better for the State to abandon its interest in the road at once, than to attempt their further management through the aid of receivers at such ruinous loss.

Accordingly, in pursuance of these recommendations of the commissioners, the General Assembly passed the Act of December 21, 1870, to amend the Act of July 1, 1870. In its preamble, it recited that, in the recent attempt to sell the State's interest in said road, various legal questions arose, presenting serious obstacles to a sale under the Act of 1870, which it was deemed expedient and necessary to obviate before the interest of the State in said roads should be again offered for sale and that, by the twelfth section of the Act of February 11, 1852, the right was expressly reserved to the State to enact all such laws in the future as should be deemed necessary to protect the interest of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of said act, in such manner as not to impair the vested rights of stockholders of the companies.

It therefore enacts that a bill shall be immediately filed in the Chancery Court at Nashville, in the name and on behalf of the State to which all the delinquent companies, the re-

spective bondholders, holders of the bonds, creditors, and all persons interested in the said several roads, shall be made parties defendants, and be brought before the Court in the mode prescribed by the rules of practice in chancery established in the State, except as otherwise therein provided. And said Court was thereby invested with exclusive jurisdiction to hear, adjudicate, and determine all questions of law and matters of controversy of whatever nature, whether of law or of fact, that have arisen or may arise touching the rights and interest of the State, and also of the stockholders, bondholders, creditors, and others in said roads, and to make all such rules, orders, and decrees, interlocutory and final, as may be deemed necessary, in order to a final and proper adjustment of the rights of all the parties, preliminary to the sale of the interest of the State in said road; to declare the exact amount of indebtedness of each company to the State; and to define, as may be thought proper, what shall be the rights, duties, and liabilities of a purchaser of the State's interest in said roads, and what shall be the reserved rights of said companies, stockholders, and others, respectively, as against said purchasers after such sale.

A special term of the Court was appointed for March 4, 1871, for the purpose of expediting the proceedings; and the final decree was made subject to review by appeal on writ of error to the Supreme Court, to be taken within thirty days from its rendition. The sale of the State's interest, under the decree, was to be made by the commissioners, at a specific value, to be fixed by the Court, either at public or private sale; if it could be obtained. The sale might be on time, and the amount of the purchase money might be discharged in any of the outstanding legal bonds of the

State; that upon the sale of any of the franchises of either of the railroad companies, all the rights, privileges, and immunities appertaining to the franchise so sold, under its act of incorporation, and the general improvement law of the State, and acts amendatory thereof, shall be transferred to and vest in such purchaser, and he shall hold said franchise subject to all liens and liabilities in favor of the State, as now provided by law, against the railroad companies.

The proceedings which took place under the authority of this act are fully set forth in the transcript of the record thereof, which is a part of the record in these causes.

On December 13, 1871, the General Assembly passed an act to further enable railroad companies to pay their debts to the State, and complete the construction of their roads.

It authorized such railroad companies in the State as were indebted to the State by reason of bonds loaned or indorsed, or by reason of the purchase of railroads or railroad property from the State, to mortgage their original property, and all acquired by purchase from the State, for the purpose of issuing *consolidated first mortgage bonds*, as thereinafter provided. These bonds are not to be issued to purchasers until the indebtedness due the State by reason of bonds loaned to the company shall have been first paid to the comptroller or his agent in New York, and until said company shall have deposited with him or his agent in New York an amount of such consolidated mortgage bonds equal in amount to the bonds indorsed by the State for such company, which bonds thus deposited shall be surrendered to the company, bond for bond, upon the return of said bonds so indorsed by the State, which shall then be cancelled. After the total in-

debtedness to the State is satisfied by these means, the remainder of the bonds, or the proceeds thereof, may be applied to the construction, equipment, or repair of the road, or in liquidation of any other indebtedness that may be deemed advisable by the company. The purchaser of any of the railroads or railroad property sold by the State is thereby also authorized to mortgage the railroads or railroad property purchased, for the purpose of procuring money for the payment of their indebtedness for the same and the further purpose of completing the connections of said roads so purchased; provided that the mortgage so authorized and the bonds issued thereunder shall not interfere with, but shall be secondary to the lien retained upon said roads and railroad property by the State for deferred payments on the purchase. It is also provided that nothing in the act shall have the effect to impair in any manner the lien of the State upon any railroad or railroad property for the payment of the debt of the State incurred on account of bonds loaned or indorsed to such railroad, but such lien shall remain in full force and effect *until all such bonds are retired;* which, of course, having reference to all the provisions of law on that subject, means until that debt for which the lien was originally reserved has been discharged in the mode provided, either by the payment to the State of an equal amount of its bonds of every description, or by a sale of the railroad itself to a purchaser, authorized to pay for it in such bonds. To make this clause mean the literal retirement of the very bonds issued to each company, before the lien on its railroad can be discharged, is simply to take back in the exception all that is contained in the grant, and to nullify every other provision of the law on that subject. It is an illustration of a

common but loose use of language wherein the bonds themselves are referred to, instead of the debt created to the State, in consideration of its loan of them.

It will not have escaped observation that, in describing the bonds of the State that are permitted to be used in the payment of the debts of the railroad companies, the phrase *legally issued* occurs. The correct history of the legislation on the subject discloses that this expression was intended to be emphasized, and that its use justifies the inference of a suspicion, on the part of the public authorities of the State, that some of the issues of State bonds were not altogether untainted with illegality. This inference is strengthened by the fact that, on January 28, 1871, the legislature passed an act directing suits to be brought in the name of the State of Tennessee, by the attorney-general, against railroad companies, their officers, agents, and stockholders. It recited that information had been furnished the General Assembly that various railroad companies, through their officers, had fraudulently obtained the issuance of the bonds of the State, and also had obtained other bonds, contrary to the provisions of the general improvement laws of the State, and the express provisions of the several acts granting them State aid, and also had disposed of said bonds in direct violation of law, and had also illegally appropriated the proceeds to other uses than those prescribed by law, and that the interests of the State demand that suits should be instituted for redress, in the name of the State.

The attorney-general was accordingly directed to institute suits against certain named railroad companies, with the consent and concurrence of the commissioners for the sale of delinquent railroads, to recover decrees for an amount

sufficient to compensate the State of Tennessee for any loss it may have sustained, or that it may be liable to sustain, because of such fraudulent and illegal acts, according to the provisions of the thirteenth section of the Act of February 11, 1852.

No suits were brought under the provisions of this act. Governor John C. Brown, in his message to the General Assembly, at its session in 1871–2, said:

"The legislation of the last two years, as it appears to me, precludes any discrimination in our bonds, upon any assumption of illegality in their issuance.

"The Act of the 25th February, 1869, as amended by the Act of 20th January, 1870 (ch. 44), permitting railroads indebted to the State, by reason of bonds loaned to them, to cancel their obligations with bonds of any series or number, in effect acknowledges a liability of the State to pay all outstanding bonds, not specially excepted by the act itself or amendments thereto. The act itself makes no exception. The Act of 6th December, 1870, prohibits the comptroller of the treasury from receiving the bonds issued to the Mineral Home Railroad Company, and the Act of the 29th June, 1870, forbids the redemption of the bonds issued to the Insurance Company of the Valley of Virginia. And, by interdicting the reception of no other bonds, implied authority is thereby given to receive all bonds not excepted in those acts. And this is an unmistakable declaration to all the world that all other bonds issued under the semblance of law are regarded as obligatory upon the State. Accordingly, bonds to over eight millions of dollars have been retired and cancelled, nearly all of which are bonds issued since the war Other roads have purchased, and are now purchasing, bonds with which to cancel their liabilities to the State, under the same act, which is unrepealed."

In the same message, the governor calls attention to the existing law, whereby solvent railroad companies are permitted to pay, in past due coupons, the current interest on the bonds loaned them by the State, while the latter is obliged, by taxation, to levy the money to pay the bondholders,

and states that the amount of bonds originally issued, with subsequent bonds to fund accrued interest, to which this remark is applicable, amounted to $5,166,167.45. He says, in addition :

"The delay of the solvent roads that have not retired their indebtedness to the State, under the Act of January 20, 1870, to avail themselves of the benefits of the act, indicates an indisposition to do so. And, inasmuch as more than eighteen months have elapsed since this legislation was adopted, I recommend that the act be either repealed, to take effect at some future time, not remote, or that its provisions be so amended as that the roads be required to pay all accrued interest as well as the sinking-fund not heretofore paid in. The reason for this suggestion is, that ample time has elapsed for these roads to have aided the State in diminishing her outstanding indebtedness, under this most liberal legislation, if disposed to do so."

The following is another extract from the same message :

"There remain but three of the delinquent railroads unsold. The information you have, through the report of the commissioners appointed to sell the delinquent roads, is all you desire on that subject. It will be a gratifying result when the State is entirely divorced from the railroad system. And, although the sales will not realize all that was desired, and leaves a large debt to be provided for, yet the internal improvement system of Tennessee has added millions to her wealth, and diffused such energy and enterprise into every class of society, that no intelligent man regrets the policy which inaugurated the system, notwithstanding a large amount of appropriations, made since the war, may have been improperly expended. Commerce, trade, and manufactures have been promoted and multiplied, population has largely increased, and the value of real estate enhanced over one hundred millions of dollars."

The next and final stage in the history of this legislation, is the funding Act of March 17, 1873, to fund the past

due bonds and coupons of the State, and to sustain the credit thereof.

It was thereby enacted, that all the outstanding legally issued bonds of the State of Tennessee, due or to become due before the first day of January, 1874, as well as all past due coupons, and coupons maturing on or before the first day of January, 1874, may be funded in six per cent. coupon bonds of the State of Tennessee, to be styled "the new series of funding bonds," redeemable at the option of the State, after July 1, 1884, and due and payable on the first of July, 1914; that, when any of the past due bonds aforesaid are presented to the comptroller, or when $1,000 in past due coupons are presented, the comptroller and governor shall audit and examine the demand presented, and, if genuine, shall prepare a bond of the series mentioned in the first section of the act, and, when signed by the governor, and countersigned by the secretary of State and registered in the office of the latter, as also the fundable bonds or coupons, and a memorandum thereof, signed by the party demanding the new bond, the secretary of State shall make its issuance on its face, and deliver it to the party applying. All bonds so retired, were to be cancelled. The third section of the act is as follows:

"That the faith, honor, and credit of the State of Tennessee is hereby pledged for payment of said bonds at maturity; and for providing a sinking-fund for that purpose, and for the prompt payment of interest on said bonds, as well as the interest on the registered bonds hereinafter provided for, commencing with the interest to fall due on the 1st day of July, 1874. And it is hereby made the duty of the treasurer of the State to set apart for that exclusive purpose so much of the revenue as may be necessary to pay the interest of said bonds, commencing with the interest that falls

due the first day of July, 1874: *Provided*, nevertheless, that the coupons of bonds owned or held in trust by educational institutions within this State shall be paid and not funded, those past due and those not yet due; and if these institutions elect not to be paid their bonds, they shall nevertheless be entitled to their interest at maturity: *And provided further*, that preference shall be given to the interest on the school fund as provided by law."

The fifth section is as follows:

"That this act shall not affect the liabilities of any railroad, turnpike, or other corporation or person, for or on account of the bonds issued or loaned or indorsed by the State for internal improvements or otherwise, nor any lien in favor of the State as against purchasers of delinquent railroads."

The seventh section provides that no part of the public debt shall be refunded, paid, or received, except as provided in this act, and all laws providing any other mode or manner of funding the debt was thereby repealed, provided that no part of the act was intended to prevent the payment of the warrants issued by the comptroller, nor the loan accounts, nor the reception of the old issue of the Bank of Tennessee in payment of revenue; and provided further, that the notes of the Bank of Tennessee, signed by G. C. Torbett, shall not be received for taxes or other dues to the State.

The ninth section provides,

"That no coupons of bonds now due shall be paid other than those coupons falling due on and after the 1st day of July, 1874, and only such coupons of said bonds maturing after that time, as shall be presented to the comptroller, who shall examine the same, and, if found to have been issued according to law, shall be registered, and the registration properly indicated therein by him and the secretary of State, and the comptroller and secretary of State shall each receive for each bond registered under this act, the sum of fifty cents, to be paid by the party presenting said bonds for registration."

The interest on the funded bonds authorized by the act, together with the interest of the bonds registered according to the provisions of the ninth section of the act, was made payable in the city of New York or Nashville, at the option of the holder. All bonds falling due between July 1, 1874, and July 1, 1884, were made fundable at the option of the State in bonds authorized by the first section of the act. And all bonds and coupons thereto attached, issued by authority of the General Assembly of the State, in compliance with the law enacted and in force at the time of their issuance, whether they were issued previous to the sixth day of May, 1861, or subsequent to the reorganization of the State government, on the 3d day of May, 1865, might be funded or registered, according to the provisions of the act; but all bonds and coupons, issued by any authority, or pretended authority, on and after May 6, 1861, up to April 3, 1865, and all bonds or liabilities issued for war purposes, were expressly excepted from the act; as also all others known to have been stolen from the State, or which were fraudulently issued or obtained.

All the bonds held by those who are prosecuting these suits, and by those on whose behalf they are prosecuted, were registered in accordance with the terms of this act; and the past due coupons thereon, including those which fell due January 1, 1874, were funded in new bonds, authorized by it.

This statute, and the acceptance of it by the holders of State bonds, is of the greatest significance in this discussion. The third section contains an express pledge of a specific fund by the State to the payment of the principal and interest of the bonds issued or registered under it. It is, prior to

that, a renewal of the original pledge of the faith, honor, and credit of the State for the payment of the bonds at maturity, for providing a sinking-fund for that purpose, and for the prompt payment of the interest accruing on the same, both the refunding and the registered bonds. It then sets apart for that exclusive purpose so much of the revenues as may be necessary to pay the interest on said bonds, commencing with that falling due July 1, 1874. That being accepted by the bondholders, by the registration of their bonds, constitutes a contract between them and the State. Whether it is enforceable by process of law or in equity, matters not. It is, in any view, a new contract. If it does not abrogate the old one, or makes no such changes in its terms as to release the prior obligation of any parties theretofore bound, nevertheless it is distinctly and substantially a new contract. As such, it is evidence of the highest character, amounting, as we insist, to plenary and convincing, if not conclusive proof, that the only contract the holders of the State bonds believed and claimed they had the right to rely on was the one with the State, as expressed in the bonds.

T. e reservation in the fifth section is not inconsistent with this conclusion. On the contrary, it corroborates it. It declares that the act shall not affect the liabilities of any railroad, etc., for or on account of the bonds issued, loaned, or indorsed by the State for internal improvements or otherwise. But this does not mean liabilities to the holders of such bonds; for it is immediately coupled with the words, "nor any lien *in favor of the State* as against purchasers of delinquent railroads." The grammar of the sentence seems, if not to require, at least to admit, that the words *to the State* are coupled with the *liabilities* as well as *the lien*.

But even if this be not strictly so, the meaning requires that the reservations of the entire section be intended for the State, and not for any one else.

Beyond this, however, this section recognizes the lien of the State for deferred payments of purchase money due from purchasers of delinquent railroads, under the Act of December 21, 1870. It is an affirmance of the validity and binding force of the proceedings under that act and of the sales which resulted. That, of course, is an acknowledgment that the liabilities of the railroad companies, for bonds issued and loaned to them under the internal improvement laws was to the State, and not to the holders of State bonds. And all holders of State bonds, who funded their coupons and registered their bonds, under this act, including the complainants and their associates, and those they represent, thereby became parties to this affirmance and acknowledgment, as one of the terms and conditions of their new contract with the State, contained in this statute. It is a waiver and an estoppel.

The result of the operations authorized by these acts, in respect to the public debt of Tennessee, may be briefly summed up as follows:

The total amount of bonds issued by the State, at various times and for all purposes, is stated to be	$49,173,316 66
Of these, there are now outstanding	20,221,300 00
Leaving	$28,952,016 66

which have been cancelled, by renewal of past due bonds, and by liquidation of debts due by railroads. (*Deposition of Jas. L. Gaines.*)

The total amount of bonds issued to railroads was	$29,250,000 00
Of these, there have been cancelled about	15,000,000 00
Leaving	$14,250,000 00

Eleven delinquent railroads were sold under the judicial proceedings, by virtue of the Act of July, 1870.

The net proceeds of these sales were	$6,698,000 00
The amount of the indebtedness of these railroads was	19,593,029 12
Being a loss of	$12,895,029 12
The amount of railroad indebtedness retired by payment in State bonds was	$14,787,600 00
Add amount paid by Louisville and Nashville Railroad Company, in 1865	707,631 25
	$15,495,231 25

Of railroad bonds issued by the various companies, secured by mortgage on their roads and property, and bought by purchasers, on the faith that they supersede or are entitled to the benefit of the State lien, and are first mortgages, there are outstanding, approximately, and as now represented in these suits, as follows:

Louisville and Nashville—	
Loan of 1868	$7,059,000 00
Loan of 1872 (sterling)	2,500,000 00
Loan of 1873	2,000,000 00
Memphis and Ohio—	
Loan of 1871	3,500,000 00
Nashville and Decatur—	
Loan of 1870	2,100,000 00
Nashville, Chattanooga and St. Louis—	
Loan of 1873	6,800,000 00

Memphis and Charleston—	
Loan of 1877	4,700,000 00
East Tennessee, Virginia and Georgia—	
Loan of 1870	3,500,000 00
Knoxville and Ohio—	
Loan of 1876	500,000 00
Aggregate	$31,759,000 00

This does not include the mortgage on several of the railroads, as there are many in which no appearance has been made on behalf of their interests, and several in which no one on their behalf could be made parties. It is certainly within, rather than beyond, the fact, to say that more than fifty millions of dollars have been invested on the faith that the settlements between the State of Tennessee and its railroad companies were valid and effectual.

Six of the railroads were sold and conveyed to purchasers under the foreclosure acts.

If these proceedings were invalid, it must be because of some one, or all of the objections taken to them by the learned counsel for appellants, in the argument now submitted by them (p. 382), to-wit:

First. That the proceeding was not judicial, but legislative. The argument upon this point rests upon the fact that the State, being trustee of the lien, assumed to be the owner, and authorized a sale of the property, with the privilege to the purchaser of paying for it in any bonds of the State.

The Act of December 22, 1870, furnishes a complete answer to this argument. The first section requires that all

persons, and classes of persons, including the "bondholders" shall be made parties. This means that service of notice shall be made upon them in the mode required by the general statutes of Tennessee. The power given to the Court was to hear and determine the rights of all parties. It is true that the act assumes, as did all other acts of the legislature of Tennessee, before and after that date, that the lien belonged to the State, this assumption being necessarily involved in the provision that the purchase-money might be paid in any valid bonds of the State. But the submission to the Court for adjudication, of all questions that could arise between bondholders and the State, with authority to decree a sale of the railroads in execution of the decree, made it perfectly competent for the Court to find, if the law required such finding, that the lien enured to the benefit of the bondholders and to require payment of the purchase-money in cash, or in the surrender of the bonds secured by the lien upon the road sold.

The language in which the jurisdiction of the Court is defined is the broadest that could have been used for that purpose. If the provision as to the medium of payment was invalid, it did not affect the validity of the remainder of the act. The vicious part of a statute may be rejected, and the remainder enforced.

It must not be forgotten that this feature of this act, is but a modification of the seventh section of the Act of 1852, which required payment to be made in money to be invested in bonds, and that the modification is within the power to modify reserved in the twelfth section of that act.

It was conceded in the argument, in the Circuit Court, and will be conceded here that in a proceeding authorized

by the Act of 1852, it would not have been necessary to make the bondholders parties in order to secure the purchaser a clear title to the railroad property sold under the decree. While the original act did not authorize a sale upon the roads for non-payment of the sinking fund, the Act of February 21, 1856, did authorize such sale. This act was passed before any of the bonds held by the complainants, or those whom they represent, (with a few possible exceptions) were issued, and this act would fully sustain the proceeding in question, if it rested alone upon it, except as to some mere matters of practice, joinder of parties, etc., which cannot be important here.

Second. The second objection is that the Chancellor had given an opinion upon one of the questions which arose in the case.

It is sufficient answer to this suggestion, to say:

1st. That Chancellor East had no "interest in the event of the case." 2. He was not connected with either of the parties "by consanguity or affinity," and 3rd, he never was "of counsel" in the case.

Third. That the bill did not pray for a compulsory sale, and the decree were made by consent.

It is quite true that the consent of the railroad companies could not bind the bondholders. They could only consent for themselves, and they did not offer to consent for others. Their declination of contest with the State, was simply the usual and ordinary permission of judgment by default. But as to the other defendants, the Court was obliged to pass upon the questions involved without reference to the default of the railroad companies, and it did so.

No question of mere regularity or irregularity in these proceedings can arise here. The complainants must show the proceedings to be void, not merely voidable. The argument that the bill did not sufficiently advise the Court that there was, or might be, a controversy as to the rights of the bondholders, does not reach the substance of the bill, for the face of the bill shows that the Court was fully advised by it that the bondholders had, or might have, claims, and that it was charged with the judicial duty of passing upon them.

Fourth. The fourth objection is that the decree in the cause does not "pretend to decide upon the rights of the holders of State bonds issued to the companies." The learned counsel for the appellants accompany this objection with a quotation from the decree which provides a sufficient answer to it. If the complainants were asserting a different title from that which the Court passed upon in that decree, a new and independent title which had arisen since the date of the decree, there might be some ground to assert that that part of the decree which declared that they would have no rights at the date of the maturity of the bonds would not apply to such new title, but the parties were before the Court and the question was upon their interest in the property as it then appeared. A mortgagee whose debt has not matured, may be made a party to foreclosure proceedings, and will be estopped by a decree against him.

Fifth. The fifth objection is that complainants' rights were equitable, and that the bill was not so framed as to reach such rights. Attention has already been called to the fact that the bill set forth in detail, all the facts connected with the issuance of the bonds, and thus brought before the Court the title of the bondholders, whatever it was.

Sixth. Want of jurisdiction, this argument rests upon the assumption that there was no actual seizure of the property, and, therefore, the proceeding was not *in rem*, and jurisdiction was not acquired.

It is too late to deny that a proceeding to foreclose a mortgage-lien is a proceeding *in rem*.

Waples Proceedings in Rem, Sec. 607, and authorities cited.

Respectfully submitted,

WM. M. RAMSEY.

12
Nos. 50.46.49.51

OCT 16 1884
JAMES H. MCKENNEY
CLERK

114-663

UNITED STATES SUPREME COURT.

Calvin Amory Stevens, et als.

vs.

Nashville & Chattanooga Railroad Co.,
Nashville & Northwestern Railroad Co.,
McMinnville & Manchester Railroad Co.,
And Winchester & Alabama Railroad Co.

BRIEF OF EAST & FOGG,

Relative to the foreclosed Roads.

A. B. Tavel, Stationer, Nashville.

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CALVIN AMORY STEVENS *et. als.*,

vs.

NASHVILLE & CHATTANOOGA RAILROAD COMPANY,
NASHVILLE & NORTHWESTERN RAILROAD COMPANY,
McMINNVILLE & MANCHESTER RAILROAD COMPANY,
AND WINCHESTER & ALABAMA RAILROAD COMPANY.

This argument will involve the consideration of the effect of the judicial proceedings, which were had in the Chancery Court at Nashville, between the State of Tennessee as complainant, and certain defaulting railroad companies as defendants. Under and by virtue of the Act of February 11, 1852, and amendments thereto, the State had loaned her bonds to certain railroad companies; these companies failed to comply with the requirements and conditions of the loan, both as regards the payment of the interest, as well as the payments to the sinking fund in extinguishment of the principal.

The companies thus proceeded against, and the amounts loaned each of them by the State, are as follows:

EDGEFIELD & KENTUCKY RAILROAD COMPANY.

Before the war	$ 750,000.00
Since the war	525,000.00
Interest funded by State under Act of Nov. 23, 1865,	231,812.00
Debt to United States for the purchase of rolling stock and machinery for company by the State, by Act of May 24, 1866, with interest	171,875.45
Unfunded interest in arrears January 1, 1871	402,492.26
Total	$2,081,179.71

This road was about 48 miles long, and sold for $———. It had never paid the expenses of running it.

TO THE NASHVILLE & NORTHWESTERN R. R. CO.

December 22, 1859, under Act of February 11, 1852,	$ 280,000.00
June 12, 1860, Bridge aid	50,000.00
June 20, 1860, under Act of February 11, 1852	100,000.00
August 11, 1860	130,000.00
September 14, 1860, Bridge aid	170,000.00
October 19, 1860, under Act of February 11, 1852	165,000.00
December 18, 1860, under Act of February 11, 1852	190,000.00
January 27, 1861, under Act of February 11, 1852	120,000.00
February 23, 1861, under Act of February 11, 1852	130,000.00
April 22, 1861, under Act of February 11, 1852	120,000.00
Total before the war	$1,455,000.00
April 4, 1866, under Act of January 18, 1866	$ 275,000.00
May 12, 1866, under Act of February 11, 1852	225,000.00
July 6, 1866, under Act of January 18, 1866	150,000.00
July 17, 1866, under Act of May 22, 1866	75,000.00
December 6, 1866, under Act of January 18, 1866	50,000.00
January 2, 1867, under Act of December 10, 1866	200,000.00
March 23, 1866, under Act of December 10, 1866	25,000,00
June 27, 1867, under Act of March 7, 1867	125,000.00
June 25, 1867, under Act of December 10, 1866	92,000.00
December 27, 1867, under Act of December 7, 1867	100,000.00
July 17, 1868, under Act of December 7, 1867	43,000.00
July 27, 1868, under Act of December 7, 1867	207,000.00
July 29, 1868, under Act of December 7, 1867	100,000.00
July 29, 1868, under Act of December 7, 1867	100,000.00
Total bonds	$3,222,000.00
Interest funded under Act November 23, 1865	392,850.00
Unfunded interest in arrears	926,279.41
Grand total, January 1, 1871	$4,541,129.41

Of the foregoing, $550,000.00 was loaned the receiver of the road. Beside the debt of the State, the company owed the United States more than half a million of dollars incurred in the purchase of rolling stock after the war, and had also made a second mortgage and issued bonds for more than a million of dollars, and had besides a floating debt of several hundred thousand dollars. It

paid neither interest or sinking fund, and whether run by the company or receiver, its expenses exceeded the income. It having failed in the hands of either the company or receivers to pay expenses, it was leased to the Nashville & Chattanoooga Railroad Company. It brought at the sale $———, payable in State bonds.

THE MEMPHIS, CLARKSVILLE & LOUISVILLE R. R. CO.

Received of State bonds before the war	$1,042,000.00
Received of State bonds since the war	540,000.00
Interest unpaid	312,600.00
Interest due January 1, 1871	559,525.92
Debt to United States assumed by State	380,756.24
Interest on same to January 1, 1871	118,913.76
Grand total	$2,953,795.92

TO MCMINNVILLE & MANCHESTER R. R. CO.

July 1, 1855, under Act of February 11, 1852	$ 300,000.00
July 22, 1866, under Act of February 11, 1852	20,000.00
November 19, 1866, under Act of February 11, 1852.	52,000.00
April 4, 1866, under Act of January 18, 1866	346,000.00
January 26, 1869, under Act of May 25, 1868	54,000.00
	772,000.00
Funded interest	87,360.00
Unfunded interest	240,218.00
Grand total	$1,099,578.00

This company paid nothing towards sinking fund or interest, and never paid expenses, either in the hands of the company or receiver. It brought at sale $———.

TO WINCHESTER & ALABAMA RAILROAD COMPANY.

May 10, 1858, under Act of 1856.	$ 7,000.00
June 9, 1858, Bridge aid	7,000.00
July 22, 1858, under Act of February 11, 1852	150,000.00
December 30, 1858, Bridge aid	2,000.00
January 31, 1859, under Act of February 11, 1852	111,000.00
January 21, 1860, under Act of February 11, 1852	136,000.00
February 23, 1860, under Act of February 11, 1852	20,000.00
Before the war	$ 433,000.00

March 10, 1868, under Act of July, 1866	250,000.00
July 13, 1868, under Act of July, 1866	122,000.00
April 16, 1867, under Act of December 10, 1866	150,000.00
December 11, 1867, under Act of 1855–6	34,000.00
January 30, 1868	300,000.00
Since the war	856,000.00
Before the war	433,000.00
Total	$1,289,000.00
Funded interest	143,259.00
Interest to January 1, 1871	359,277.70
Grand total	$1,791,536.70

This road never contributed to sinking fund or paid any interest. It was run by receivers, and never paid expenses, and brought at sale $———, payable in Tennessee bonds.

TO SOUTHWESTERN R. R. CO., CALLED "SOUTHERN."

From June 27, 1868, to January 28, 1870	$ 503,000.00

No part of this road was ever completed.

TO KNOXVILLE & KENTUCKY RAILROAD COMPANY.

From May 1860, to November 17, 1860	$ 180,000.00
From April 27, 1865, to March 6, 1869	2,120,000.00
Total of bonds	$2,300,000.00
Funded interest	43,200.00
Interest due January 1, 1871	422,976.00
Grand total	$2,766,176.00

TO CINCINNATI & CUMBERLAND GAP RAILROAD COMPANY.

August 3, 1860, under Act of March 22, 1860	$ 132,000.00
From July 19, 1866, to May 1, 1868	1,241,000.00
Total	$1,373,000.00
Funded interest	31,680.00
Interest to January 1, 1871	252,528.52
Grand total	$1,657,208.52

TO KNOXVILLE & CHARLESTON R. R. CO.

From January 3, 1867 to May 7, 1868	$710,000.00
Funded interest due January 1, 1871	106,000.00
Grand total	$816,000.00

TO ROGERSVILLE & JEFFERSON R. R. CO.

From January 28, 1859, to August 1, 1859	$159,000.00
From April 24, 1866, to March 28, 1868	226,000.00
Total of bonds	$385,000.00
Funded interest	38,000.00
Interest due January 1, 1871	108,853.20
Grand total	$531,853.20

TO EAST TENNESSEE & WESTERN NORTH CAROLINA.

From April 28, 1868, to June 5, 1869	$400,000.00
Interest to January 1, 1871	48,000.00
Grand total	$448,000.00

All the foregoing companies were totally insolvent, and had utterly failed, both in the hands of their respective companies or receivers, even to pay expenses, much less interest or sinking fund. The original loans were supplemented by large additional loans by the State, in the vain hope of improving their earnings.

The Act of February 11, 1852, which constitutes the basis of this whole scheme, had been amended by the Legislature from time to time, and these bonds were issued under the original act as amended.

The 12th section of the Act of February 11, 1852, is as follows:

"Be it enacted, That the State of Tennessee expressly reserves the right to enact by the Legislature thereof hereafter, all such laws as may be deemed necessary to protect the interest of the State, and to secure the State againt loss, in consequence of the issuance of bonds under the provisions of this Act, but in such manner as not to injure the vested rights of stockholders."

Either generally, and by virtue of inherent power, or by virtue of the rights and powers reserved, the State has passed the following amendment, pertinent to the question discussed herein:

The 5th section of the Act of February 11, 1852, required railroad companies receiving aid to deposit in the Bank of Tennessee, fifteen days before the interest becomes due on the bonds loaned by the State, "an amount sufficient to pay such interest," with exchange, etc., and in case of default, the property of the company was to be put in the hands of a receiver and operated by him until a sufficient sum was realized, less costs and expenses, to meet the default which the State had previously paid. The act fails to make any provision for the contingency of the inability of the receiver to make costs, expenses and interest out of the earnings of the road; and this failure, not having been foreseen or provided for, had to be provided for afterwards, or leave the State to the statutory remedy alone, and to continue to run the road at a loss, or abandon it entirely.

By the 7th section of the Act of February 11, 1852, it was provided, that each company having received State aid by the loan of bonds, shall set apart annually one per centum (after changed to two per centum, by Act of February 21, 1856, page 2196, section 5), and should the company fail to do so, "it shall be proceeded against, as provided in the 5th section, that is, by the appointment of a receiver." Here again, we have an unprovided for contingency—*i. e.*, the inability of the receiver from the gross incomes of the property, to pay the required amount into the sinking fund. This latter was remedied by the 6th section of the Act of February 21, 1856, (page 2199), which provided that upon the failure to pay the amount due the sinking fund by the company, the Governor, by the Attorney-General of the district, "shall immediately proceed against said company to collect said sinking fund in the manner prescribed in the 6th section" of the Act of February 11, 1852, *i. e.*, by a bill for the sale of the property and assets. Certainly all bonds loaned to railroad companies or sold by them *after* the passage of the act, (February 21st, 1856) and before any rights under the former act had vested in the purchaser, as such, were affected by it, and all purchasers thereafter were affected with notice. This view whittles the bonds now outstanding, issued prior to this act, down to a small number, and complainants must exhibit such previously issued bonds in order to obtain a decree.

Did the Legislature, under its reserved power or otherwise, have the right to enact this statute, as against bondholders who had bought bonds previously to its passage, and was it a fair exercise of

the reserved power? If so, we maintain that as all the roads, which were afterwards proceeded against by the State, had so failed after an honest exhaustion of all other remedies, fell within the category of the statute, and the sales thereof were right and proper.

The original act required these sinking fund payments to commence within five years after the *completion* of the roads. This, for obvious reasons, was changed to "five years *from* the *issuance*" of the bonds. (Sec. 5, Act of Feb. 21, 1856). And as I have said, changed the amount from *one* to *two* per cent. per annum. As to these changes the court below said: "It would be unjust and repugnant to reason and common experience to assume that the Legislature passed the act in the expectation that the roads would never be finished, or would not be completed within a reasonable time. Besides, section twelve reserved to the State ample power to make such modifications in relation to the time for the sinking fund to commence, and the per cent. annually to be paid into that fund, as would fully protect the interests of the State against delay on the part of the railroad company."

Our adversaries may concede the right to the Legislature to change the *time* at which these payments were to commence, and to increase the rate per cent. per annum, and say, "There was no power reserved to sell the road in the event of a failure, and this is the point of which we complain." To this we point to the broad terms of the 12th section.

By the Act of January 18, 1866, (page 2258) the State loaned bonds additional to previous loans as follows, to

Memphis, Clarksville & Louisville Railroad Co.....	$400,000.00
Edgefield & Kentucky Railroad Co.....	115,000.00
Manchester & McMinnville Railroad Co.....	346,000.00
Nashville & Northwestern Railroad Co.....	300,000.00
Knoxville & Kentucky.....	250,000.00
Rogersville & Jefferson.....	100,000.00
Winchester & Alabama.....	372,000.00

By the 4th section of this Act, granting these loans, it is provided that each road shall pay to the Treasurer of the State, as a sinking fund, four per cent. on the amount of its indebtedness, and also the interest on said bonds, and the State hereby reserves a lien (cumu-

lative of, and in addition to, the lien given in the Act of Feb. 11, 1852) "on the profits of said roads," which shall be enforced as now provided by law. (Page 2261).

By an Act passed Dec. 15, 1866, (page 2262) additional aid, in State bonds, was granted as follows: [I only mention the roads which were afterwards foreclosed.]

Knoxville & Charleston	$300,000.00
Cincinnati, Cumberland Gap & Charleston	500,000 00
Knoxville & Kentucky	500,000 00
Nashville & Northwestern	200,000.00
Winchester & Alabama	150,000.00
East Tennessee & Western North Carolina	150,000.00

By an Act passed Dec. 7, 1867, additional loans of bonds were made as follows:

Nashville & Northwestern	$350,000.00
Knoxville & Kentucky	800,000.00
Cincinnati, Cumberland Gap & Charleston	200 000.00
Winchester & Alabama	300,000.00
Southwestern Railroad Co	300,000.00
Knoxville & Charleston	150,000.00
East Tennessee & Western North Carolina	100,000.00
Edgefield & Kentucky	300,000.00

The 15th section of this Act (page 2278) provides that, if the several railroad companies to whom the bonds of the State have been loaned *by this* or *former acts*, shall fail for two consecutive years to pay the interest that may accrue upon the bonds loaned to them severally, then and in that case the Governor, etc., "may, at their discretion, sell said railroads, upon such terms and conditions as they may deem best to secure the interest of the State, and shall retain of the proceeds of said sales the amounts loaned to said companies and the interest due on the same, with expenses of sale."

As respects the holder of bonds loaned under this act, can it be doubted that the State has the power of sale, and is the owner of the lien?

By an Act passed July 1, 1870, it was declared that "the time had arrived when it was necessary to protect the interests of the State and to secure the State from loss in consequence of the issuance of bonds to the several railroad companies, that a sale should

be made of the interest of the State in each and every railroad company in the State which has heretofore failed to pay the interest that has accrued on the bonds of the State loaned to it, and which may hereafter fail." The act then proceeds to appoint the Governor, Secretary of State, Comptroller, and Robert J. McKinney, Archibald Wright, (both ex Supreme Judges) and Francis B. Flogg (an old and eminent lawyer) Commissioners to sell all roads, which received bonds under the Act of December 7, 1867, or former acts, and which have failed, for two consecutive years, to pay interest.

By the Act of July 8, 1870, (page 2341) these Commissioners were empowered to lease out all roads which they could not sell.

These Commissioners failed to make any sales, and reported to the Legislature the difficulties preventing them, (page 2345) and among others specified the following:

1. The minimum price fixed by the Legislature was entirely too high.

2. Embarrassing *judicial* questions of serious importance to the interest of the State, stockholders, bondholders and creditors of the several companies, evidently referring to these alleged liens.

3. Injunction bills filed against them by some of the railroad companies and certain creditors; these latter were holders of Receivers' certificates of indebtedness.

4. Second mortgage bondholders, claimed liens prior to those of the State, as respects the second issuance of bonds by the State.

5. Whether the lien of the State provided for by the Acts of February 11, 1852, is to secure the holder of the bond at its maturity, or is it the property of the State?

This report led to the enactment of December 21, 1870, (page 2353) directing a bill to be filed in the Chancery Court at Nashville, in the "name and behalf of the State" against "the delinquent companies," the "respective stockholders," "holders of bonds," "creditors," and all persons interested in said several roads." It directs that these parties "shall be brought before the court in the mode prescribed by the rules of chancery practice established in the State." It invests the court with jurisdiction "to hear and determine all questions of law and matters in controversy of whatever nature, whether of law or fact, that have arisen or may arise, touching the rights or interests of the State, and also of the stockholders,

bondholders, creditors and others in said roads," and "to make all such rules, orders, and decrees, interlocutory and final, as may be deemed necessary in order to a final and proper adjustment of the rights of all parties, preliminary to a *sale* of the *interest* of the State in said roads."

Such a bill was filed against eleven roads, each of which had failed to pay anything at any time, either to the sinking fund, or as interest, and the aggregate indebtedness of which was $———.

As this argument only relates to three of said roads, to wit: Nashville & Northwestern, Winchester & Alabama, and McMinnville & Manchester, I shall notice only so much of said proceedings as relate to these.

1. Each company was made a party and served with copy bill and process.

2. The county of Davidson, as a stockholder in the Nashville & Northwestern Railroad Co., R. C. McNairy, M. Burns, and E. H. Hicks, stockholders in Northwestern Railroad Co.

3. P. H. Marbury, W. P. Hickerson, Jas. P. Thompson, T. D. Hickerson, William Moore and Matt Smartt, stockholders in the McMinville & Manchester.

4. The Mayor and City Council of Nashville, and John Frizzell, stockholders in the Winchester & Alabama Railroad Co.

The bill then proceeds to show the various acts of the Legislature, incorporating and loaning bonds to each of said companies, and the amount loaned each, and the various acts of the Legislature authorizing the loans, and the conditions thereof, as set out hereinbefore. It alleged, that under the act of January 18th, 1866, the Nashville & Northwestern Railroad Co. received in bonds $300,000.00, the McMinnville & Manchester $346,000.00, the Winchester & Alabama $372,000.00, and that said bonds were issued "with all the restrictions, liens and provisions of said act of January 18th, 1866."

It alleged, that by the act of May 20th, 1866, the McMinnville & Manchester Railroad Company was granted $54,000.00 bonds, on the conditions of the act of January 18th, 1866.

It alleged, that under the act of December 7, 1867, these companies received bonds as follows: Nashville & Northwestern, $350,000.00, Winchester & Alabama, $300,000.00, and then reiterates

the restrictions and penalties of the 15th section of that act, relative to the failure to pay interest for two successive years.

It then alleged, that the Nashville & Northwestern Railroad Co. had, by virtue of the 16th section of its charter, passed January 22d, 1852, made a mortgage and issued bonds thereunder, and that seven hundred thousand of said bonds had been issued, and it charges that said mortgage and bonds, on the face, were postponed to the lien of the State of Tennessee.

It charges the insolvencies of said companies. It sets out the amount of bonds issued to each railroad company, the act authorizing the issuance, and the dates at which the various companies received the different amounts of bonds, both before and since the war.

The bill prayed process and copy bill "against the companies respectively, and all named stockholders and those not named, *against the holders of State bonds issued to such companies.*"

"The holders of bonds of the companies issued by them and secured by liens" and "all creditors of said railroad companies," and "all persons interested in said roads." It prays for "process of publication as to those parties whose names and residences are unknown."

It prays for all necessary and proper interlocutory orders and decrees, for all accounts, for decree of sale of the property of the various roads, the rights of the purchaser, etc., and for general relief.

Publication was made for all stockholders in said roads where names were not known and set out, and also for "the holders of the bonds issued by the State to the respective railroad companies" (which are named), also "holders of bonds issued by said railroad companies." Also "the creditors of said railroad companies and 'all persons interested in said before named railroad companies.'" This publication was made for the time required by the Tennessee statute, in two papers published in Nashville. (See deposition of Roberts and Jones, pages ————.)

This publication was made January 20th, 1871, requiring defendants to appear by the first Monday in March, 1871.

To procure publication the statute of Tennessee requires the bill ordinarily to be sworn to by the complainant, his agent or attorney.

This had been omitted, and on the 17th of March, 1871, W. B. Reese, one of the solicitors for complainant, made and filed the presented oath, *nunc pro tunc*.

On the 15th of April, 1871, an amended bill was filed by the State in the cause, bringing before the court several matters not necessary to the interest of *these* defendants, and which I omit, but did allege that they had found one Dempsy Weaver, who was the holder of one of the bonds issued to the Nashville & Northwestern Railroad Company by the State, and that the Nashville & Chattanooga Railroad Company was the holder of ten mortgage bonds, issued by the McMinnville & Manchester Railroad Company, but have been unable to find any other holder; that it can find no other holder of any of the State bonds issued to either of said railroad companies. The bill further alleges that after diligent inquiry it has not been able to ascertain the names and residences of any of the several classes of parties made defendants, except those mentioned in original and this amended bill. This amended bill reiterates all the allegations and prayers of the original bill, and was properly sworn to April 15th, 1871. Publication for unknown parties was duly made under an interlocutory order, according to the laws and practice of Tennessee, requiring the defendants to enter their appearance by the 15th of May, 1871. All named parties were executed with process and copy bill.

The bill against the Nashville & Northwestern Railroad Company was demurred to by the company. Answered by Jno. A. Gardner, a stockholder. Demurred to by the county of Davidson as a stockholder, and answered by the Nashville & Chattanooga Railroad Company, and answered by Weaver, admitting that he held one of the bonds issued to that company by the State.

Lewis T. Parson, a mortgage bondholder, filed a demurrer; also A. H. Hicks, as a bondholder.

July 7th, 1871, pro confesso decrees were entered as to the "unknown stockholders," "unknown holders of bonds issued by the State to the Nashville & Northwestern Railroad Company," "unknown holders of bonds issued by said company," "and the creditors of said company and all other persons interested in said railroads."

The demurrer of the Nashville & Northwestern Railroad Company was overruled, and leave given to file an answer, which it refused to do. A pro confesso was entered as to it July 7, 1871.

Hicks, Parsons and the county of Davidson filed answers July 10th, 1871. Depositions were taken and filed, and the cause heard July 18th, 1871. The court decreed that the company had received of the State bonds to the amount of $4,511,129.41, with interest to January 1, 1871, and that the company had never complied with the provisions of the acts granting the loan, and had been for many years in default; that the receivers had been appointed under the statute, and that the expenses have exceeded income; that the State has a statutory lien superior and prior to all other liens; and hence decreed a sale of the road and its assets.

The defendants appealed to the Supreme Court, and subsequently dismissed the same. The road was sold to the Nashville & Chattanooga Railroad Company for $2,400,000.00 in the bonds of the State, and the report of sale confirmed.

ARGUMENT.

First, as to the power of the Legislature of the State to pass the Acts which led to the sale of the various railroad properties: Did the Legislature of the State have the power to enact the fifth and sixth sections of the Act of Feb. 21, 1856, (page 2195)? That section is as follows:

"SECTION 6. *Be it further enacted*, That should any of said railroad companies fail or refuse to comply with the provisions of the fifth section of this Act, it shall be the duty of the Governor forthwith to notify the Attorney-General of the District in which is situated the place of business of said company failing or refusing as aforesaid, of the fact; and thereupon the Attorney-General shall immediately proceed against said company to collect said sinking fund in the manner prescribed in the sixth section of an Act entitled 'An Act to establish a system of internal improvements, passed Feb. 11, 1852.'"

That is, the Attorney-General was to file a bill against the defaulting company, and the Court should, if necessary, "order a sale of said road and all the property and assets attached thereto or belonging to said company, or in such other manner as the Court may deem best for the interest of the State."

When was this bill to be filed? According to the fifth section, upon the failure of any railroad company to "annually set apart and pay over to the Treasurer of the State two per centum per annum upon all bonds which have been or may hereafter be issued, or endorsed as aforesaid, as a sinking fund." And these payments to the sinking fund were to commence five years from the issuance or endorsement of the bonds. The bill filed in the Chancery Court at Nashville set out this Act and alleged the default. Certainly all bonds issued after the passage of this Act—*viz.*, Feb. 21, 1856—were issued subject to its conditions in every respect. As to bonds subsequently issued, the State had the clear right to pass this Act, and complainants and all others who seek to come in under any decree pronounced in their favor must exhibit bonds issued before the date of this Act. But did not the Legislature have the power, under the twelfth section, to pass the Act and have the sale, even as against holders of bonds previously issued?

The reservation to the State in this twelfth section is the right

—"to enact all such laws as may be deemed necessary to protect the interest of the State and to secure the State against loss," etc.

II.

When the railroad companies took additional aid under the Act of January 16, 1866, (and all the companies proceeded against in the State Chancery Court did so) they took the bonds subject to the fourth section of said Act, requiring "each road to pay to the Treasurer of the State as a sinking fund four per cent. on the amount of its indebtedness, and also the interest on said bonds," under the penalty of a sale, as prescribed in the Act of February 21, 1856. So the companies which took bonds under the Act of December 10, 1866, (p. 2263) and December 7, 1867, took them under the definite and clear provision of the fifteenth section (2278), to the effect that if the companies "shall fail for two consecutive years to pay the interest that may accrue on the bonds loaned to them, then the Governor shall sell said railroads." As the latter course—*i. e.*, a sale by the Governor—never took place, it is needless to discuss it, and it is only referred to to show the legislative construction of the reserved power.

III.

There are but two grounds upon which the State's right to have a sale could possibly be vested, as against the holders of bonds issued and sold prior to February 21, 1856; and these are as follows:

1. Under the powers reserved in the twelfth section of the original Act.

2. Under the inherent right of a lien-holder, seeing the property was about to be lost by waste and decay, and the debt daily growing larger, to seek the aid of a Court of Equity to relieve both the lien-holder and the mortgagor from total loss to both by a sale.

IV.

The bill under which these decrees of sales were obtained charged specifically that the lien retained in the statute authorizing the issuance of the bonds was the lien of the State, both as to the original issuance of bonds and subsequent issues. The bill specifically charged that (see page 2591):

"The failure of these companies to comply with any one of the conditions upon which State aid was extended to them, makes a forfeiture of all their rights under the internal improvement laws, and authorizes your orator (State) to demand a sale of all the property and effects, rights, privileges and franchises of said several companies, the proceeds of sale to be applied, first, to the extinguishment of the debt due your orator, with interest and costs, and the surplus, if any, to the satisfaction of other debts in the order of their liens." (See page 2591).

The bill specifically alleges:

"Your orator claims, in any event, priority of satisfaction out of the incomes or sales of said roads for the whole of the indebtedness of said companies, as hereinbefore recited, or as the same may be found to be, over all other creditors or claimants of said roads, of every nature and kind whatever." (See page 2591.)

One of the prayers of the bill is:

"Your orator also prays your Honor to decree a sale of said roads, with all their property, franchises and rights, if necessary and proper upon final hearing, as manifestly for the interest of all parties, and expressly or tacitly assented to by such parties, such sale to be made by the commission appointed by the Legislature, the proceeds of sale to be paid to the parties entitled," etc. (See page 2593).

It is true, as complainant alleges, and there are expressions in the bill relative to a sale of the "State's interest," but the argument is more ingenious than fair which gives the scope of the bill no more extent than those words imply. The bill had several times asserted

that the State was the sole owner of the statutory lien, and that this lien had prior rights to all other liens, and this being the mind of its authors when they used the words the "State's interest" they meant the interest created by the statutory lien, which was all the interest. The bill no where discloses the fact that the State had any other interest than that of sole lien holder and owner, and failing to do so, there could have been no application for the words "State's interest" other than I have mentioned. The decree must be construed by the pleadings. It is true that there was not much serious litigation between the State and the railroad companies, nor could there be. The companies had received the bonds of the State in the amounts and upon the conditions charged in the bill. That they generally declined a contest is not strange; nor does this fact help complainants. Each defendant should have set up his own defense. The railroad companies had none. The bondholders were made defendants and it was their duty to come in and set up their rights.

That the decree of July 6, 1871, does decide the rights of the holders of State bonds, as well as all others, it seems could admit of but one conclusion. After stating the loan of the bonds, the inability of any of the companies to pay either principal or interest, and the fact of their utter insolvency, the decree then recites:

"That it is the duty of the Court to adjudicate and determine all questions of law and matters of controversy of whatever nature, whether of law or fact, that have arisen or may arise, touching the rights and interest of the State; also of the stockholders, *bondholders*, creditors and others in said road; likewise to define, as may be thought proper, what shall be the rights, duties and liabilities of a purchaser of the State's interest in said roads or either of them, and what shall be the reserved rights of said company, stockholders and others, respectively, as against said purchasers after such sale." (See page 2645).

The decree then recites that "it further appearing to the satisfaction of the Court that the holders of the State bonds issued by the State to the said several companies are properly made defendants to this suit, and are sufficiently represented by the holders of such bonds as are made defendants by name or have come in and answered." The Court holds:

"That the lien of the State to the full extent of the debt of said several companies for the State bonds issued to them severally, as aforesaid, and the unpaid interest thereon, as ascertained by the decrees in this cause, is *prior imperio* to the claims of all other creditors of said several companies, of every nature and kind whatever, and whether secured by mortgage, pledge, judgment or otherwise without security." (See page 2646).

The decree then proceeds to declare the rights of the purchasers, and says that the sale shall

—"vest the purchaser with a full, perfect and complete title, free from the claims of stockholders, *holders of State* bonds and creditors of any kind." (See page 2647).

There can be no doubt that there are sufficient allegations in the bill to warn all parties to the proceeding of the hostile claim of the State, and that the decree undertakes to sell the entire property unincumbered to the purchaser. The only remaining question is:

V.

Were the Bondholders Parties to this Proceeding?

Under the Tennessee practice, Code, 4352; page —: "Personal service of process on the defendant in the Court of Chancery is dispensed with in the following cases," sub-section 4 and 5:

"When the name of the defendant is unknown, and cannot be ascertained upon diligent enquiry."

"When the residence of the defendant is unknown, and cannot be ascertained upon diligent enquiry."

In these two instances, Section 4358 (see page —) provides:

"When the suit is against an unknown defendant the order of publication should describe such unknown party, as near as may be, by the character in which he is sued and by reference to his title or interest in the subject matter of the litigation."

How were these provisions complied with?

The bill, after naming the railroad companies proceeded against, then names the following:

"The respective stockholders of these companies."

"The holders of the bonds issued by the State to these companies."

"The holders of bonds issued by any of these companies."

"The creditors of said companies."

"All other persons interested in said several roads or companies."

The bill then alleges:

"All of whose names and residences are unknown, except as follows:"

The order of publication follows the bill in the enumeration of the unknown parties and their residences.

It says, after mentioning the railroad companies, and the fact that the names and residences of the various stockholders "are all unknown, as also the names and residences of a number of the holders of the bonds issued by the complainant, the State of Tennessee, to the before-named railroad companies."

The amended bill, filed April 15, 1871, makes the several classes of defendants named in the original bill parties, declares that their "names and residences are unknown and cannot be ascertained after diligent enquiry." (See page 2623).

This amended bill was duly sworn to by the State's agent and attorney, W. B. Reese.

The original bill had been filed Jan. 20, 1871, and publication made requiring defendants to enter their appearance by the first Monday in March, 1871. It was not sworn to until March 17, 1871. This defect was cured by the amended bill being sworn to, and a second publication made for all the parties mentioned, in both the original and amended bill, requiring them to enter their appearance by the 15th of May, 1871. (See page 2632).

It would be difficult to describe the unknown parties in this case other than as the *holders* of bonds issued by the State to one or more of the railroad companies named. How else could the "character in which he is sued" or "his title or interest in the subject matter of the litigation" be declared? The bond was his title or interest, as the holder of a State bond, issued to either of the roads, was his character. Our adversaries do not suggest what should have been added, or supply the "missing link" in the description of the defendant bondholders. It would be difficult to describe them or their interest more exactly.

Constructive service of process by publication in Chancery proceedings when authorized by the statutes of a State is sufficient to bind the property.

Pennoyer *vs.* Neff, 95 U. S., 727.

Boswell *vs.* Dickerson, 4 McLean, 262.

A proceeding to enforce a mortgage or lien is an equitable proceeding *in rem.*

Hughes *v.* Edwards, 9 Wheat., 489.

Dundas *v.* Bowles, 3 McLean, 204.

McCall *v.* Carpenter, 18 How., 297.

Pennoyer *v.* Neff, 95 U. S., 714.

VI.

The Judge who presided in the Chancery Court was not incompetent. The railroad company (Nashville & Decatur) in whose be-

half he concurred, in an opinion prepared by its Alabama attorney, was no party to any of the suits in the State Chancery Court. All that can be said on this subject is this: The Judge had, a few years before, concurred in an opinion upon one of the questions afterwards involved in these litigations.

EAST & FOGG, *Solicitors.*

8-

Nos. 50-46-49-51

FILED
OCT 16 1884
JAMES H. McKENNEY,
CLERK

1114-663

United States Supreme Court.

Calvin Amory Stevens, et. als,

vs.

Nashville & Chattanooga Railroad Co.,
Nashville & Northwestern Railroad Co.,
McMinnville & Manchester Railroad Co.,
And Winchester & Alabama Railroad Co.

Brief of East & Fogg,

Solicitors for Defendants.

Albert B. Tavel, Stationer and Printer, Nashville.

PART I.

May it please the Court:

The argument which I shall submit applies to the following railroad companies, each of which are defendants.

First—The Nashville & Chattanooga Railroad Company.

Secondly—The Nashville & North Western Railroad Company.

Thirdly—The McMinnville & Manchester Railroad Company.

Fourthly—The Winchester & Alabama Railroad Company.

All of these roads are now under one system—the three last named above were purchased at a judicial sale had and made at the instance of the State of Tennessee by the chancery court at Nashville, and being so purchased by the Nashville & Chattanooga Railroad Company, the name of the latter was changed, and the name of the whole system is the "Nashville, Chattanooga & St. Louis Railway."

II.

The bonds so issued by the State to each of these companies were identical in form, as follows:

$1,000 $1,000

No. UNITED STATES OF AMERICA. No.

Know all men by these presents: That the State of Tennessee acknowledges to owe to ——— ——— or order, One Thousand Dollars of the lawful money of the United States of America, which the said State promises to pay in the City of New York, on the —— day of ———, 18—, with interest thereon at the rate of six per cent per annum, according to the tenor, and upon the presentation of the coupons hereunto attached.

For the payment of said sums of money and the interest thereon, at the time and place, and the manner aforesaid, the faith of the State of Tennessee is irrevocably pledged, this bond being issued in pursuance and by authority of an Act of the Legislature of Tennessee, etc.

The coupons were as follows:

$30 $30

The Treasurer of the State of Tennessee will pay the bearer THIRTY DOLLARS, in the City of New York, on the first day of January, 18—, being the semi-annual interest then falling due on bond No. ——.

————————————, *Comptroller.*

III.

The bonds issued to these companies were issued at the dates, under the act of the Legislature, in the amounts and numbered as set out in the appended tabular statement:

TO THE NASHVILLE AND NORTHWESTERN RAILROAD COMPANY.

Date of Issuance.	Under What Act.	Amount.	How Numbered.
Dec., 1859	Feb. 11, 1852	$280,000	From 10,322 to 10,601
June, 1860	Feb. 11, 1852	50.000	From 11,395 to 11,444
June, 1860	Feb. 11, 1852	100,000	From 11,445 to 11,544
Aug., 1860	Feb. 11, 1852	130,000	From 67 to 196
Sept., 1860	Feb. 11, 1852	170,000	From 197 to 366
Oct., 1860	Feb. 11, 1852	165,000	From 717 to 881
Dec., 1860	Feb. 11, 1852	195,000	From 1,029 to 1,218
Jan., 1861	Feb. 11, 1852	120,000	From 1,239 to 1,358
Feb., 1861	Feb. 11, 1852	130,000	From 1,359 to 1,488
Apr., 1861	Feb. 11, 1852	120,000	From 1,587 to 1,706
Apr., 1866	Jan. 18, 1866	275,000	From 41 to 315
May, 1866	Feb. 11, 1852	225,000	From 2,246 to 2,470
July, 1866	Jan. 18, 1866	150,000	From 3,710 to 3,859
July, 1866	May 22, 1866	75,000	From 4,118 to 4,192
Dec., 1866	Jan. 18, 1866	50,000	From 4,956 to 5,005
Jan., 1867	Dec. 10, 1866	200,000	From 5,594 to 5,793
Mar, 1867	Dec. 10, 1866	25,000	From 6,711 to 6,735
Mar., 1867	Mar. 7, 1867	125,000	From 6,892 to 7,016
June, 1867	Dec. 10, 1866	92,000	From 8,202 to 82,93
June, 1867	Dec. 7, 1867	100,009	From 101 to 200
June, 1867	Dec. 7, 1867	43,000	From 3,118 to 3,160
June, 1867	Dec. 7, 1867	207,000	From 3,161 to 3,368
June, 1867	Dec. 7, 1867	100,000	From 3,369 to 3,467
June, 1867	Dec. 7, 1867	100,000	From 3,568 to 3,667
Bonds issued before the war			$1,455,000 00
Bonds issued since the war			1,767,000 00
Total			$3,222,000 00
Interest funded			392,850 00
Interest due to January 1, 1871			926,279 41
Grand total due the State January 1, 1871			$4,541,129 41

TO THE McMINNVILLE AND MANCHESTER RAILROAD COMPANY.

Date of Issuance.	Under What Act.	Amount.	How Numbered.
July, 1855	Feb. 11, 1852	$ 300,000	From 2,553 to 2,852
July, 1856	Feb. 11, 1852	20,000	From 4,472 to 4,491
Nov., 1856	Feb. 11, 1852	52,000	From 4,896 to 4,947
Apr., 1866	Jan. 18, 1866	346,000	From 316 to 661
June, 1866	May 26, 1866	54,000	From 3,306 to 3,359
Total		$ 772,000	
Funded interest		87,360	
Interest due January 1, 1871		240,218	
Total debt due the State		$1,099,578	

TO THE WINCHESTER AND ALABAMA RAILROAD COMPANY.

Date of Issuance.	Under What Act.	Amount.	How Numbered.
May and June, 1858	Act of 1856	$ 7,000	From 7,081 to 7,087
May and June, 1858	Bridge aid	7,000	From 6,674 to 6,680
July, 1858	Feb. 11, 1852	150,000	From 7,431 to 7,580
Dec., 1858	Bridge aid	2,000	From 8,325 to 8,326
Jan., 1859	Feb. 11, 1852	11,000	From 8,327 to 8.337
Jan., 1859	Feb. 11, 1852	5,000	From 8,338 to 8,342
Jan., 1859	Feb. 11, 1852	2,000	From 8,366 to 8,367
Jan., 1859	Feb. 11, 1852	93,000	From 8,398 to 8,490
Jan, 1860	Feb. 11, 1852	126,000	From 8,986 to 9,111
Feb., 1860	Feb., 11, 1852	20,000	From 10,774 to 10,793
June, 1866	Act of 1866	250,000	From 8,976 to 9,111
July, 1866	Act of 1866	122,000	From 3,996 to 4,117
Apr., 1867	Act of 1866	150,000	From 7,551 to 7,700
Dec., 1867	Act of 1855-6	34,000	From 8,513 to 8,546
Jan., 1868	Order of Governor, under act of December 7, 1867	300,000	From 1,761 to 2,060

TOTAL OF BONDS ISSUED TO WINCHESTER AND ALABAMA RAILROAD COMPANY.

Before the war	$ 433,000 00
Since the war	856,000 00
Total	$1,289,000 00
Funded interest	143,159 00
Interest due to January 1, 1871	358,277 70
Total indebtedness to State	$1,790,536 70

TO THE NASHVILLE AND CHATTANOOGA RAILROAD COMPANY.

395 all dated before 1860.

IV.

The Constitution of the State has the following clause:

"A well regulated system of Internal Improvements is calculated to develop the resources of the State and promote happiness and prosperity of her citizens, therefore it ought to be encouraged by the General Assembly."

V.

HISTORY OF INTERNAL IMPROVEMENTS IN TENNESSEE PREVIOUS TO 1845.

The public improvements in the State of Tennessee previous to 1845 (at which time the Nashville & Chattanooga Railroad Company was chartered), were confined to turnpikes. In these improvements the State took one-third the stock necessary to complete the improvement (vol. 4, page 1945). This system worked badly and produced great dissatisfaction among the people. When the railroad era arrived there was much discussion as to the kind of aid and the amount of aid, the State government would give to these improvements. These discussions led to the Act of February 11, 1852, entitled:

An Act to Establish a System of Internal Improvements in this State. (*Ch.* 151 *Laws pp.* 204 *to* 215).

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, that whenever the East Tennessee and Virginia Railroad Company shall have procured *bona fide* subscriptions for the capital stock in said company to an amount sufficient to grade, bridge, and prepare for the iron rails the whole extent of the main trunk line proposed to be constructed by said company, and it shall be shown by said company to the Governor of the State, that said subscriptions are good and solvent, and whenever said company shall have graded, bridged, and shall have ready to put down the necessary timbers for the reception of rails, and fully prepared a section of thirty miles of said road at either terminus, in a good and substantial manner, with good materials, for putting on the iron rails and equipments, and the Governor shall be notified of these facts, and that said section, or any part thereof, is not subject to any lien whatever, other than those created in favor of the State by the Acts of 1851–52, by the written affidavit of the Chief Engineers and President of said company, together with the written affidavit of a competent engineer by him appointed, at the cost of the company, to examine said section, then said Governor shall issue *to said company* coupon bonds of the State of Tennessee, to an amount not exceeding eight thousand dollars per mile on said section, and on no other condition, *which bonds shall be payaale at such place in the United States as the President of the Company may designate*, bearing an interest of six per centum per annum, payable semi-annually, and not having more than forty nor less than thirty years to mature.

SEC. 2. Be it enacted, That the bonds before specified shall not be used by said company for any other purpose than for procuring the iron rails, chairs, spikes, and equipments for said section of said road, and for putting down said iron rails, and the Governor shall not issue the same unless upon the affidavit of the President, and a resolution of a majority of the Board of Directors, for the time being, that said bonds shall not be used for any other purpose than for procuring the said iron rails, chairs, spikes, and equipments for said section, and for putting down said iron rails, and the Governor shall have the power to appoint a commissioner to act under oath, in conjunction with said President in negotiating said bonds for the purposes aforesaid, and to act in any other matters pertaining to said company, where the interest of the State, in the opinion of the Governor, may require it.

SEC. 3. Be it enacted, That so soon as the bonds of the State shall have been issued for the first section of the road as aforesaid, they shall constitute a lien upon said section so prepared as aforesaid, including the road-bed, right of way, grading, bridges, and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes and equipments, when purchased and delivered, and the State of Tennessee, upon the issuance of said bonds, and by virtue of the same shall be invested with said lien or mortgage without a deed from the company, for the payment by said company of said bonds, with the interest thereon as the same becomes due.

SEC. 4. Be it enacted, That when said company shall have prepared as aforesaid, a second section, or any additional number of sections of twenty miles each of said road, connecting with a section already completed for the iron rails, chairs, spikes and equipments, as provided in the first section of this act, and the Governor shall be notified of the facts as before provided, he shall, in like manner, issue to said company like bonds of the State of Tennessee, to an equal amount with that before issued under the first section of this act, for each and every section of twenty miles of said road so prepared as aforesaid, but upon the terms and conditions hereinbefore provided, and upon the issuance of the said bonds, the State of Tennessee shall be invested with a like mortgage or lien without a deed from said company, upon said stock, and upon said first and additional section or sections of said road so prepared, upon the rails and equipments put, or to be put upon the same, for the payment of said bonds and the accruing interest thereon. Provided, that if the last section of said road shall be less than twenty miles, or if the railroad proposed to be constructed by any company hereinafter specified, shall be less than thirty miles in extent, bonds of the State shall be issued for such section, or such railroad, as may be less than thirty miles in extent, for an amount in proportion to the distance, as provided in this act, but upon the same terms and conditions in all respects, as required in regard to the bonds to be issued for the other sections of said road. And when the whole of said road shall be completed the State of Tennessee shall be invested with a lien, without a deed from the company upon the entire road, including the stock, right of way, grading, bridging, masonry, iron rails, spikes, chairs, and the whole superstructure and equipments, and all the property owned by the company as incident to or necessary for its business; and all depots and depot stations, for the payment of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds. And after the Governor shall have issued bonds for the first section of the road, it

shall not be lawful for the said company to give, create or convey to any person or persons, or body corporate whatever, any lien, encumbrance or mortgage of any kind which shall have priority over, or come in conflict with the lien of the State herein secured; and any such lien, incumbrance or mortgage shall be null and void as against said lien or mortgage of the State, and the said lien, a mortgage of the State, shall have priority over all other claims existing or to exist against said company.

SEC. 5. Be it enacted, That it shall be the duty of said company to deposit in the Bank of Tennessee, at Nashville, at least 15 days before the interest becomes due from time to time, upon said bonds issued as aforesaid, an amount sufficient to pay such interest, including exchange or necessary commissions, or satisfactory evidence that said interest has been paid or provided for, and if said company fail to deposit said interest as aforesaid, or furnish the evidence aforesaid, it shall be the duty of the Comptroller to report that effect to the Governor, and the Governor shall immediately appoint some suitable person or persons, at the expense of the company, to take possession and control of said railroad, and all the assets thereof, and manage the same, and receive the rents, issues, profits, and dividends thereof, whose duty it shall be to give bond and security to the State of Tennessee, in such penalty as the Governor may require, for the faithful discharge of his or their duty as receiver or receivers, to receive said rents, issues, profits and dividends, and pay over the same, under the direction of the Governor, towards the liquidation of such unpaid interest. And if said company fail or refuse to deliver up said road to the person or persons so appointed by the Governor, the said person so appointed shall report that fact to the Governor, who shall forthwith issue his warrant, directed to the Sheriffs of the counties through which the road shall run, commanding them to take possession of said road, fixtures and equipments, and every thing pertaining thereto, and place the said receiver in full and complete possession of the same, and said receiver so appointed shall continue in the possession of said road, fixtures and equipments, and run the same, and manage the entire road, until a sufficient sum shall be realized, exclusive of the costs and expenses incident to said proceedings, to pay off and discharge the interest as aforesaid, due on said bonds, which being done, the receiver shall surrender said road and fixtures and equipments to said company. The Comptroller shall from time to time, settle the accounts with the receiver, and the balance shall be deposited in the treasury of this State. The Comptroller is authorized, and it is made his duty upon his warrant to draw from the treasury any sum of money necessary to meet the interest on such bonds, as may not be provided for by the company, as provided for in this act, and the Comptroller shall report thereof to the general assembly from time to time.

SEC. 6. Be it enacted, That if said company shall fail or refuse to pay any of said bonds when they fall due, it shall be the duty of the Governor to notify the Attorney-General of the district in which is situated the place of business of said company, of the fact, and thereupon, said Attorney-General shall forthwith file a bill against said company in the name of the State of Tennessee, in the Chancery or Circuit Court of the county in which is situated said place of business, setting forth the facts, and thereupon said Court shall make all such orders and decrees in said cause as may be deemed necessary by the Court, to receive the payment of said bonds with the interest thereon, and to indemnify

the State of Tennessee against any loss on account of the issuance of said bonds, by ordering the said railroad to be placed in the hands of a receiver, ordering the sale of said road, and all the property and assets attached thereto or belonging to said company, or in such other manner as the Court may deem best for the interest of the State.

SEC. 7. Be it enacted, That at the end of five years after the completion of said road, said company shall set apart one per centum per annum upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the company shall pay into the treasury of the State, after assigning them to the Governor, and for which the Governor shall give said company a receipt, and as between the State and said company, the bonds so paid in shall be a credit on the bonds issued to the company. And bonds so paid in and the interest accruing thereon, from time to time, shall be held and used by the State as a sinking fund for the payment of the bonds issued to the company, and should said company repurchase any of the bonds issued to it under the provisions of this act they shall be a credit as aforesaid and cancelled. And should said company fail to comply with the provisions of this section, it shall be proceeded against, as provided in the 5th section of this act.

SEC. 8. Be it enacted, That the President of the company shall make semi-annual reports, under oath, to the Governor, until the completion of said road, setting forth fully the condition of the road and the company, and after its completion, he shall report to the Governor annually, showing the financial condition of the company, giving a statement of the trade and travel upon the road, the receipts and expenditures, net earnings and dividends, and what per cent. is paid on the stock to the stockholders. And said report shall be consolidated every two years by the President of said company, and said consolidated reports shall be laid before the Governor by the first of September, every two years after the completion of the road, and the Governor shall lay said report before the Legislature for its action, at the next meeting thereof, after said report is made.

SEC. 9. Be it enacted, That it shall not be lawful for any officer of said company to engage in any speculation or dealing, either directly or indirectly, in any real estate on or along the line, at any of the depots or depot stations, or at either terminus of said road, until after the road is completed, and every officer of the company, before entering upon the duties of his office, shall take an oath in writing before any judge or justice of the peace in this State, that he will not knowingly violate the provisions of this act, and that he will faithfully perform the duties of his office, and if any such officer of the company or other person taking an oath as herein provided, knowingly swear falsely, he shall be deemed guilty of perjury and subject to all the pains and penalties thereof, and every affidavit required under this act, may be sworn to before any judge or justice of the peace in this State.

SEC. 10. Be it enacted, That the provisions of this act shall extend to and embrace the Chattanooga, Harrison, Georgetown and Charleston Railroad Company, the Nashville and Northwestern Railroad Company, the Louisville and Nashville Railroad Company, the Southwestern Railroad, the McMinnville and Manchester Railroad Company, the Memphis and Charleston Railroad Com-

pany, the Nashville and Southern Railroad Company, the Mobile and Ohio Railroad Company, the Nashville and Memphis Railroad Company, the Nashville and Cincinnati Railroad Company, the East Tennessee and Georgia Railroad Company, the Memphis, Clarksville and Louisville Railroad Company, and the Winchester and Alabama Railroad Company, so far as the main trunk roads to be constructed by said companies lie within the limits of this State, and not otherwise; and said companies shall have all the powers and privileges, and be subject to all the restrictions and liabilities contained in this act. *Provided*, that this act shall not extend to or embrace more of the road proposed to be built by the Memphis, Clarksville and Louisville Railroad Company, than that part which lies between the Kentucky line and the Nashville and Northwestern Railroad or the Nashville and Memphis Railroad. And provided further, That this act shall not extend to or embrace the East Tennessee and Georgia Railroad Company, unless said company shall extend their road so as to form a junction with the East Tennessee and Virginia Railroad at Knoxville; and in the event said company fail or refuse so to extend their said Railroad to make said junction, then all the rights, powers and privileges, with the restrictions and liabilities of this act shall extend to any company that may be hereafter chartered for the purpose of building a railroad to make said connection; and in no event shall the provisions of this act extend to or embrace more of the East Tennessee and Georgia Railroad, than the part which lies between Blair's Ferry and the city of Knoxville. And provided, That any lien now existing on the East Tennessee and Georgia Railroad, shall not prevent the issuance of bonds for its benefit as herein provided, but the affidavits required in the first section of this act, shall be deemed sufficient as applicable to said company, if it is stated in said affidavits that no lien has been created on said road since the passage of this act.

SEC. 11. Be it enacted, That the gauge of all of said railroads (unless connecting with roads in other States of a different gauge), shall be the same as that of the Nashville and Chattanooga Railroad, and not otherwise—and the iron rails to be put upon said road, shall not be less than eighty tons to the mile, if the U rail is used and not less than one hundred tons to the mile if the T rail is used.

SEC. 12. Be it enacted, That the State of Tennessee expressly reserves the right to enact by the Legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interest of the States and to secure the State against any loss in consequence of the issuance of bonds, under the provisions of this act. But in such manner as not to impair the vested rights of the stockholders of the companies.

SEC. 13. Be it enacted, That it shall be the duty of the Governor, from time to time, when there shall be reliable information given to him, that any railroad company shall have fraudulently obtained the issuance of the bonds of the State, or shall have obtained any of said bonds, contrary to the provisions of this act, he shall notify the Attorney-General of this State, whose duty it shall be forthwith to institute in the name of the State, a suit in the Circuit or Chancery Court of the county, of the place of business of the company, setting forth the facts. And when the fact shall satisfactorily appear to the Court, that any of said bonds shall have been fraudulently obtained, or obtained contrary to the true intent, meaning and provisions of this act, then, and in such case, the Court shall order, adjudge and decree, that said road lying in the State, with all the

property and assets of said company, or a sufficiency thereof shall be sold, and the proceeds shall be paid into the treasury, and it shall be the duty of the comptroller immediately to vest the same in stocks, creating a sinking fund, as provided for in the 7th section of this act. And said company shall forfeit all rights and privileges under the provisions of this act. And the stockholders thereof, shall be individually liable for the payment of the bonds so fraudulently obtained by such company, and for all other losses that may fall upon the State, in consequence of the commission of any other fraud by such company, excepting such stockholders as may show to the said court that they were ignorant of or opposed the perpetration of such frauds by the company,

SEC. 14. Be it enacted, That in the event any of the roads, fixtures or property belonging to any of said roads shall be sold under the provisions of this act, it shall be the duty of the Governor to appoint an agent for the State, who shall attend said sale, and protect the interest of the State, and shall, if necessary to protect said interest, buy in said road or property, in the name of the State, and in case said agent shall purchase said road for the State, the Governor shall appoint a receiver, who shall take possession of said road and property, and use the same as provided for in the 5th section of this act, and said receiver shall settle with the comptroller semi-annually until the next meeting of the general assemby.

SEC. 15. Be it enacted, That this act shall be deemed and taken to be a public act as to all purposes of notice, *Provided*, that should any of the companies hereinbefore enumerated, have *bona fide*, and before the passage of this act, purchased or otherwise contracted for, upon their own credit, the necessary iron, rails, spikes, equipments, &c., for the road or roads, or any section or sections thereof, the bonds of the State shall be issued to such company or companies, as hereinbefore prescribed. *Provided further*, that no company shall receive more than the amount per mile, hereinbefore prescribed. *And provided*, That the provisions of this act shall only extend to one of the lines of said road proposed to be constructed by the Nashville and Northwestern Railroad Company, and the Nashville and Memphis Railroad Company, between Nashville and the Tennessee River, and the company first obtaining *bona fide* subscriptions, as provided in the first section of this act, made known to the Governor as therein prescribed shall be entitled to the provisions of this act for the whole distance from Nashville to its terminus on the Mississippi River and may cross the Tennessee River at any point between Ross' Ferry and a point one mile below White Oak Island. And the other company shall have power to connect their road with the one thus entitling itself to the provisions of this act for its whole distance, at any point they may select, and shall only be entitled to the provisions of this act from the point of connection to its terminus on the Mississippi River. *Provided, also*, that if the Louisville and Nashville Railroad Company locate their road through Sumner County, by way of Gallatin, then the provisions of this act shall not extend to or embrace the Nashville and Cincinnati Railroad Company, and the charter granted to said last named Company shall, in that event, be void. But should said road not be so located, and both companies desire to run their roads to Nashville, then the provisions of this Act shall extend to the company first obtaining *bona fide* subscriptions, as provided in the first section of this Act, made known to the Governor as therein prescribed, and the other company shall unite their road to the one so provided for, at some suitable

point, at least ten miles north of Nashville, and the provisions of this Act shall extend to said road only from the point of connection to the Kentucky State line, *Provided further*, that the bonds of the State shall not issue to the Louisville and Nashville Railroad Company, or to the Nashville and Cincinnati Railroad Company, as provided in this Act, unless one of said companies shall agree to locate and extend its road across Cumberland river, at, or convenient to, Nashville or South Nashville, within ten years from the passage of this Act.

SEC. 16. Be it enacted, That the railroad companies specified in this act, and all other railroad companies hereafter incorporated in this State, shall have power to construct their roads so as to cross each other if necessary, by the main trunks or branches, or to unite with each other, or with the branches thereof; and it shall be the duty of said companies, when required, to receive on their roads and branches, the full loaded freight cars from each other and the branches thereof, and transport the same to their destination, and return them, without charging for the transportation of the goods, wares, merchandise, and produce therein, any greator rate of freight than they charge for similar goods, wares, merchandise, and produce in their own cars. *Provided*, that said companies shall not be compelled to receive such cars on their roads, unless they are constructed with the same gauge, and are of equal strength with their own cars, of which the principal engineer on the road of which it is proposed to require said cars to be transported shall be the judge. *Provided*, that the bonds of the State, proposed to be issued to the Memphis and Charleston Railroad Company under the provisions of this act, shall, in the event of their issuance to said company, be divided between the main trunk line, proposed to be constructed by said company, and the branch thereof, from the town of Moscow to the town of Somerville, in the county of Fayette, according to the respective lengths of said main trunk line and said branch; and the lien of the State, as herein secured, shall continue upon said main line, and also upon said branch, until said bonds and interest are paid, as heretofore provided.

SEC. 17. Be it enacted, That in all cases where bonds may be issued to any of said companies, as provided in this act, the State of Tennessee shall be entitled to two directors in each company, to be appointed by the Governor of the State, to which bonds may be issued.

SEC 18. Be it enacted, That when the Nashville and Chattanooga Railroad Company shall have completed twenty-five miles of their road, in addition to the eighty miles specified in the second section of the act, passed the 4th of February, 1848, chapter 169, then the Governor of the State shall indorse and guarantee, in the name and on behalf of the State of Tennessee, the bonds of said company to the amount of one hundred and seventy-five thousand dollars, and in like manner, when another section of twenty-five miles of said road shall have been completed, the Governor of the State, in the name and on behalf of the State, shall indorse and guarantee the bonds of said company to the additional amount of one hundred and seventy-five thousand dollars, and said bonds are to be indorsed and guaranteed in the same manner, and the same indemnity is to be furnished by said company for the protection of the State, and the like lien is to be given, and the same character of bonds are to be indorsed and guaranteed, as provided in the said act of the 4th of February, 1848.

SEC. 19. Be it enacted, That the aid contemplated by the first section of this act, shall only be extended to one of the roads chartered under the names of

the Nashville and Southern Railroad Company, and the Tennessee and Alabama Railroad Company. Provided, That the first one of said roads which shall secure the subscription of the capital stock, for the construction of the same, shall be entitled to such aid. Provided further, if the Nashville and Southern Railroad Company first obtain the stock in their railroad, as provided in the first section of this act, and shall construct their road to the Tennessee river, to the Mississippi State line, or to a point between the Tennessee river and the Mississippi State line, then the Tennessee and Alabama Railroad Company may construct their road from the Alabama State line to intersect with the Nashville and Southern Railroad, at such point as said company may select, and the provisions of this act shall extend to the Tennessee and Alabama Railroad from the Alabama State line to said point of intersection. But if the Tennessee and Alabama Railroad Company first obtain the stock in their railroad, as provided in the first section of this act, and construct their road to the Alabama line in the direction of Florence, then the Nashville and Southern Railroad Company may construct their railroad from the Tennessee river, the Mississippi State line, or any point between the Tennessee river and the Mississippi State line, so as to intersect the Tennessee and Alabama Railroad, at such point as the company may select, and the provisions of this act shall extend to said railroad from said point of intersection, to the Tennessee river, the Mississippi State line, or to any point between the Tennessee river and the Mississippi State line. And the Nashville and Southern Railroad Company, and the Tennessee and Alabama Railroad Company shall have power to unite or consolidate their stock if they deem it advisable, and upon such terms as the companies may agree upon. Provided also, that if the Memphis and Nashville Railroad Company shall not comply with the requirements of this act, and complete thirty miles of their road within four years; or if the Nashville and Northwestern Railroad Company shall, in like manner, fail to complete thirty miles of their road within four years, then the Tennessee Central Railroad Company shall have all the rights, powers, privileges, and benefits, intended to be given by this act, to those companies respectively, under the same restrictions and limitations; but the said Tennessee Central Railroad Company shall be allowed two years longer time, in which to prepare thirty miles of their road-bed for the reception of the iron rails, and may then receive the aid of the State, in the issuance of bonds for their benefit, as prescribed in this act. Provided, that this provision shall not preclude any subsequent legislature from extending the time of four years, in which to complete any section of thirty miles of said Nashville and Memphis, or Nashville and Northwestern Railroad. That each of said companies is hereby authorized and required to appoint an agent or agents to whom the bonds shall be delivered, and whose duty it shall be to control said bonds, and see that they are exclusively applied to the payment of the railroad iron and equipments, as provided for in this act, and for no other purposes whatever. And the said agent, before he receives the bonds of the State, shall give bond and security, to be approved by the Governor and payable to the State of Tennessee, for the application of the bonds or the proceeds thereof, to the purposes aforesaid. Provided, that before any bonds, under the provisions of this act, shall be issued to any agent of any railroad contemplated by this act, the president of any such company shall first deposit in the office of the Secretary of State, a full, true, and accurate list of all the stockholders, with the sums subscribed by each and every stockholder.

SEC. 20. Be it enacted, That no road embraced in this act shall be entitled to State aid, unless it shall, within four years, complete at least one section of thirty miles, or the whole length of the road, if less than thirty miles long.

Ten days after this statute, on February 21st, 1852, another Act was passed by the legislature of Tennessee containing, among other matters in no wise relevant to the present controversy, three sections in the following words:

SEC. 7. Be it further enacted, That the different Internal Improvement Companies to whom the bonds of the State may be loaned under the different acts of the present Legislature, shall pay the expense of engraving and preparing the same.

SEC. 8. Be it enacted, That the Governer of the State shall cause to be engraved or printed, the bonds which may be issued under the acts of the present General Assembly—as a loan—to Internal Improvement Companies, and the said bonds shall bear date on the first day of January prior to their issuance, and the coupons thereto shall be payable on the first days of January and July of each year.

SEC. 9. Be it enacted, That the coupons shall be signed and numbered by the Comptroller, and the bonds shall be countersigned, sealed and numbered by the Secretary of State, and upon delivering said bonds to the company authorized to receive the same, the Secretary of State shall take a receipt, reciting the number, date and amount of said bonds in a well bound book to be deposited in his office, and the Comptroller and Secretary of State shall each be entitled to receive twenty-five cents for each bond so prepared, to be paid by the party receiving said bonds. (Chapter 153, Laws of 1852, p. 222.)

Under and by virtue of the act of February 11, 1852, and subsequent acts amendatory thereof, the State of Tennessee loaned her bonds to numerous railroad companies to the aggregate amount of —— millions of dollars. These bonds were received of the Governor and receipted for to him by the presidents and agents of the railroad companies, and by these latter were sold in the open markets of Europe and America. All that were sold before the rebellion, were sold at par or higher. Those received and sold since the war, were sold at different prices, few, if any, selling at par. The interest on these bonds was regularly provided for by the companies, and paid to the State or its bank, down to the commencement of the rebellion.

After the close of the war, some of the roads went back into the hands of the stockholders, and were managed by them. Others were managed by receivers appointed by the Governor, who was empowered to appoint such receivers by the acts of the Legislature, granting the loan of the bonds, upon the condition

that the railroad companies, failed to pay the required amount annually into the sinking fund, and also failed to provide the State with the interest semi annually accruing on the bonds. These roads so failing, were sold out at a judicial sale, upon proceedings instituted by the State against them and others, and brought about seven millions of dollars, which was paid in State bonds to the State. Other companies were allowed by the Legislature, to make mortgages, and with the proceeds of the mortgage bonds, to buy an amount of State bonds equal to the amount issued to them respectively, and pay these State bonds to the State in satisfaction of her claim for bonds loaned. Mort gage bonds to the amount of thirty million, or more, were thus issued by these companies, and sold in the markets of Europe and America, and are now outstanding, and the holders of these mortgage bonds are litigants herein by cross-bill.

Other companies substituted mortgage bonds for State bonds, and with these latter, took the place of the State, that is, taking *its* lien and rights upon the property of the company.

The complainants are the holders of State bonds originally loaned by the State to the railroad companies, under the "Internal Improvement Acts," of February 11, 1852, and the amendments thereto.

The complainants say that the *lien* which was taken under the said legislative acts belong to *them*, as holders of the State bonds, and tne object of these proceedings is to have said lien declared and enforced for their benefit, against the several railroad companies.

The defendants say, that by said acts of the Legislature, it is true a lien was taken upon the properties of the railroad companies, but that said lien was taken *solely for the benefit of the State*, and belonged to *it*, and that with the concurrence of the State said liens have been fully satisfied and discharged.

The settlement of this difference brings us at once to the consideration of said act and its amendments, running through a period of nearly twenty years.

Before entering upon the discussion of the words, phrases and sentences of said acts, I shall call the attention of the Court to the messages of the Governors which preceded and brought about the scheme of Internal Improvements. Messages of the

Governors during the time of the practical working of the statutes. Also, I invite the attention of the Conrt to the contemporaneous, subsequent and practical construction given to the original act by the various Legislatures of the State, during these twenty years, and to the construction given by the judiciary of the State during this period to these legislative acts, all these messages of Governors, these various acts of the Legislature directing the action of executive officers who were charged with the execution of these laws for twenty years, are material, and should be considered, in our efforts to arrive at the true intent of the statutes in question.

Mr. Webster, referring to contemporaneous usage, practical construction, and subsequent acts of parties, as an aid in construing statutes or contracts, said:

"All law writers recognize, common sense recognizes this principle of interpretation."

He said:

"The doctrine is expressed so accurately, tersely and completly by Sir Edward Sugden, that I will quote his words": "Tell me what you have done under such a deed, and I will tell you what that deed means." Webster's Work, vol. 5, 191.

The Supreme Court of Wisconsin have said:

"The general understanding of a law, and constant practice under it for twenty years, by the officers whose duty it is to execute it, unquestioned by any suit, or public or private action to test or settle the construction, ought to be very strong, if not conclusive." Scanlan *v.* Childs, 33 Wis., 666.

This Court held:

"The contemporaneous construction of those who were called upon to act under a law, and were appointed to carry out its provisions, is entitled to great weight." Edwards *v.* Darby, 12 Wheat., 209.

Chief Justice Marshall said of practical construction:

"If not put to rest by the practice of Government, ought to receive a considerable impression from that practice." "An exposition of the Constitution," (said he), "deliberately established by legislative acts, on the faith of which, immense property has been advanced, ought not to be lightly disregarded." McCullough *v.* Maryland, 401.

This principle has been recognized as sound by text writers and decisions of courts, until it is of universal recognition. Cooley on Constitutional Limitations, 67; United States *v.* Lytle, 5 McLean, 9; United States *v.* Gilmore, 8 Wall., 330; Dwanis on Statutes, 693; 1 Cranch, 299; *Id.*, 22; 1 Blutch., 218; 17 Mass., 144; 2 *Id.*, 477.

VI.

THE VIEWS EXPRESSED BY THE VARIOUS GOVERNORS OF THE STATE, IN MESSAGES TO THE LEGISLATURE.

On the 9th of October, 1851, four months before the passage of the act of February 11, 1852, Governor Trousdale, then retiring from office, in a message to the Legislature which created that measure said:

"Experience has shown that *partnership* between the State and individuals, in works of Internal Improvements, result badly. Perhaps the better plan would be to grant liberal charters to companies composed of individuals for the construction of railroads. Let *them*, by their money and labor prepare the road for the rails and fixtures, and then call upon the State for aid. Should it appear, on investigation, that the improvements thus made, when finished would be profitable, LET A LIEN BE TAKEN BY THE STATE UPON THE WHOLE STOCK OF THE COMPANY ON THE ROAD AS COMPLETED, AND UPON RAILS AND FIXTURES TO SAVE THE STATE FROM LOSS; AND THEN LET THE STATE LOAN HER CREDIT IN STATE BONDS."

Later in the same message he said:

"I recommend to your favorable consideration each of the roads specified above, as meriting all the aid the State can safely give, while at the same time the *interest of the State should be strictly guarded, and all necessary steps* taken to secure her against loss." Vol. 4, p. 2065.

Governor W. B. Campbell, incoming Governor, said on 28th day of October, 1851:

"It does seem to be a high duty of the State to loan her credit, at least, towards ironing and equipping the roads after they have been prepared for the iron, upon AMPLE *indemnity* by the individual stockholders against loss." Vol. 4, p. 2079.

After the war certain railroad companies having defaulted in the payment of interest on the bonds issued to them, Governor Brownlow, on the 10th of November, 1868, in a message referring to these companies, said:

"The interest of these roads, as well as that of the State, require that they should be sold, and the proceeds thereof be applied to the reduction of the State debt."

Governor Brownlow said further:

"Leading gentlemen connected with important railroads *largely indebted to the State*, are asking for authority to issue second mortgage bonds, with a view of exchanging them for State bonds, thus purchasing State bonds by the avails of these second mortgage bonds. *The debt now due by the State* would on like amount be transferred to these railroad companies, and so the State would be relieved of a burden of several million of dollars of debt now resting upon it. I regard

this proposition with approval, and advise its adoption by the Assembly. The payment of large debts now due from railroads alluded to, and the sale of the roads already in the hands of receivers, would reduce the State's liabilities at least one-third."

All the subsequent Governors approved the acts of the General Assembly selling the delinquent roads and approved various acts asserting the lien to belong exclusively to the State.

VII.

WHAT HAS BEEN THE ACTION OF THE LEGISLATURE OF THE STATE SINCE 1852. THIS ACT HAS BEEN AMENDED SINCE 1852 AS FOLLOWS:

Act of February 17, 1854, struck out the word "twenty" in the 4th section, and inserted the word "ten" in the place thereof, thereby the railroad companies could obtain State bonds upon the completion of *ten* miles, instead of "twenty" miles. Vol. 4. p. 2183.

The act of January 19, 1855, made it necessary for the engineer in chief to make the oath prescribed in the original act, in order to procure the bonds of the State, and devolved that duty upon the President and Treasurer of the company are charged therewith the knowledge of the condition and financial affairs of the company. Vol. 4, p. 2188.

This act, in the second section, made it lawful and proper for a railroad company to lay down iron at either end of the road, and draw bonds from the State.

The third section allowed State bonds to issue for ten miles or more of road graded.

The fourth section required all companies entitled to State aid for bridges, to complete the bridges before receiving the bonds. Vol. 4, pp. 2188 to 2189.

By an act passed January 30, 1856, entitled: "An act explanatory of the 16th section of the Internal Improvement law of the State," the Governor is directed to issue bonds to the Memphis and Charleston Railroad Company, (and the company had received bonds under the original act), not exceeding $10,000 per mile, upon the terms, conditions and restrictions of said act, and then proceeds to declare:

"That *the State shall have a prior lien on said road, stock, machinery, franchise and fixtures for the amount* of said bonds and interest thereon, as *is retained* by the State under said act, and the several acts in force on that subject, or (as) is now held by said State on the said roads for bonds heretofore issued, in preference to all others whatever." Vol. 4, p. 2190.

This, we regard, as a clear, unequivocal legislative construction of the act of February 11, 1852, and this act was passed before the State had ceased to pay interest on her bonds, and before any of the alleged hostile acts of later date, and while her bonds were selling at par.

The seventh section of the act of February 11, 1852, required each railroad company receiving State aid thereunder:

"To set apart one per centum upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the company shall pay into the Treasury of the State, after assigning them to the Governor."

And this payment was to be made *five years after the completion of the road.*

The act of February 21, 1856, made the following changes in the seventh section:

1. The time of payment was to commence "five years from the issuance of the bonds."

2. The amount to be set apart was *two* per cent per annum upon *all bonds which have been* or may hereafter be issued.

3. Instead of the company purchasing the bonds and assigning them to the Governor, "it was to be paid in money, and the Governor, Comptroller and President of the Bank of Tennessee were to invest it in bonds of the State, and reinvest all accruing interest in like securities," and these officers were constituted a Board of Sinking Fund Commissioners. Vol. 4, p. 2196.

This Act of February 21, 1856, section 6, changed the original act of February 11, 1852, to the effect that if a railroad company failed to pay the sinking fund as required, the Governor should notify the *District Attorney*, and it was made his duty "to file a bill against said company in the name of the State of Tennessee."

By the act of November 26, 1855, powers were given to railroad companies to consolidate with each other and become one company, and concludes section 4 as follows:

"And this act shall not work *any forfeiture of the lien retained by the State on*

railroads, but the State shall retain the lien given by the acts which this act is intended to amend."

(Meaning act of February 11, 1852), Vol. 4, p. 2184.

By the seventh section of the act of February 11, 1852, it was declared that upon the payment of the sinking fund to the Governor, that the Governor shall give the company a receipt, and *as between* the State and said company the bonds so PAID in shall be a credit on bonds issued to the company. The act of March 20, 1860, declares that amount so paid in:

"SHALL BE PASSED DIRECTLY TO THE CREDIT OF THE PARTY HAVING SO PAID THE SAME, AND BE A RELEASE TO SAID PARTY FOR THAT AMOUNT ON THE DEBT DUE BY THEM TO THE STATE OF TENNESSEE." Vol. 4, p. 2235.

Certainly the holders of any bond issued after this act of March 20, 1860, cannot insist that the credit taken for bonds so paid in by a railroad company shall not go to the extinguishment of the bulk of its debt "due the State of Tennessee." On the theory of our opponents, there was no debt due the State, but the entire debt was due the bondholders. This act removes all doubt on that question, and while it expresses the Legislature's idea and view of the act of 1852, it also gives notice that all bonds issued thereafter, will be a debt due by the railroad company receiving the bonds, "to the State of Tennessee."

By the second section of this act (March 20, 1860), if the bonds paid in by the railroad companies were straight State bonds, they were to be cancelled, if the bonds paid in were bonds endorsed by the State (as had been done in two instances), then they were to be preserved.

By the third section the sinking fund was increased to two and one-half per cent per annum, on the amount of bonds issued or endorsed to the company, to commence paying this per cent five years after the date of the bonds, and annually thereafter.

By section five the companies were permitted to pay the sinking fund in cash, or in the like character of bonds that may have been issued or endorsed by the State for said company, at their face or par value.

By section six, if paid in money, it was the duty of the Commissioners of the sinking fund to "immediately" invest it in the bonds of the State of the same character as those issued to such company, and then cancel the bonds.

Certainly the words "like character" and "same character," do not mean the same bonds originally issued. The State had issued 5 per cent bonds. 5½ per cent bonds, 6 per cent bonds, and endorsed bonds.

The seventh section of said act repeats the first section, and declares that:

"The sinking fund when PAID (that is by a return of State bonds), in all cases shall be passed directly to the credit of the said company or corporation, *and be a release to said company or corporation from that amount due by them to the State.*"

By section eight of said act, each railroad company was required to:

"*Provide* the interest semi-annually as were provided by law, on the amount of bonds *unpaid* at the time the said interest falls due, and not on the original amount."

This last is conclusive of the fact that a payment of bonds to the sinking fund was to be regarded as an extinguishment of the debt of the company *pro tanto*. As by this section the company is not required thereafter to pay interest on the original amount received by it from the State. Hence, if the company had originally received of the State a million of dollars in bonds of the State, and had paid back in any State bonds, five hundred thousand dollars thereafter, it would be required to "provide" for the interest on the remaining five hundred thousand.

The act passed February 1, 1861, suspended the act requiring railroad companies to pay *two and a half per cent* per annum for one year. Vol. 4, p. 2241.

The Louisville and Nashville Railroad Company had received State aid under the act of February 11, 1852, and acts amendatory thereto. After the war the company desired to ascertain and settle the amount due the State. And on the 17th of November, 1865, did pay in the bonds of the State, $707,631.25, and the State accepted the same. Vol. 4, p. 2251.

November 8, 1865, the Legislature raised a committee:

"To examine into the condition of the sinking fund, and ascertain what railroads have paid, and what amount, and if they have had due credit, and that the committee be authorized *to cancel all bonds of the State that have been paid in by railroads.*" Vol. 4, p. 314.

To the Legislature which assembled in 1865, (the first after the war), it was manifest that the railroads of the State, and in

which the State had invested millions of her bonds, had been the chief sufferers; they were without money, credit or rolling stock; the beds of the roads and bridges were going to waste and decay, the companies were helpless, and the property then owned by them afforded no permanent security for their outstanding liabilities. It was under these circumstances that the act of November, 1865, amendatory of the act of February 11, 1852, was passed. By this act the State authorized that her bonds be issued:

"Sufficient to pay off all the bonds and interest past due, as well as that to fall due January 1, 1866, or that may fall due during the year 1867." Vol. 4, p. 2255.

By the fourth section, all the interest on bonds issued by the State to any railroad company, and thus funded, was to be charged to the company:

"And the State shall have liens upon each of said roads, etc., for the payment of the principal and interest."

By the seventh section, each railroad company was required to:

"Pay to the Treasurer of the State (the Bank of Tennessee not resuming after the war), during the year 1867, four per cent per annum on the amount of *its indebtedness to the State*, as a sinking fund on *said debt* to be *paid* in the bonds of the State in a like character to those issued or endorsed for said company, etc., *until the whole of their indebtedness is discharged.*"

Though the State had funded the past due interest, this had not relieved the roads or put them in funds, therefore, the act of January 17th, 1866. In this, the companies to receive additional aid were named, and the sum which each should receive set out. This act required both the *sinking fund and interest* to be paid to the Treasurer of the State. Vol. 4, p. 2255.

Many of the companies, notwithstanding these large sums, were still in bad condition, and to relieve these an act was passed December 7, 1867, making specific loans to named companies, and by the fifteenth section of this act, it was declared:

"That if the several railroad companies, or either of them, to whom the bonds of the State have been loaned by this or former acts, shall fail for two consecutive years to pay the interest that may accrue upon the bonds loaned to them severally, then, and in that case, the Governor, Secretary of State and Comptroller may, at their discretion, sell said railroad, track, rolling-stock, etc., upon such terms and conditions as they may deem best to secure the interest of the State." Vol. 4, p. 2278.

This act clearly indicates that the Legislature was proceeding

as it had been doing before, upon the idea that the State took and held the statutory mortgage to secure herself, and that she had the right to sell the property of companies which should default for two consecutive years, in the payment of interest.

The act of February 25, 1869, so much complained of by our adversaries, is as follows:

CHAPTER XXXVIII.

AN ACT to liquidate the State Debt, contracted in aid of Railroad Companies, in the State of Tennessee:

WHEREAS, Under the General Internal improvement laws of the State, passed from time to time, aid has been granted to various railroad companies by the loaning of the six per cent. bonds of the State, to enable said companies to iron, equip, build and bridge, and for other purposes, which is now secured to the State by a first mortgage or lien on the franchise property and fixtures of respective railroad companies; and,

WHEREAS, It is desirable for the general welfare of the State that the State shall be reimbursed by such amounts as have been advanced to the different railroad companies as fast as may be practicable; therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the respective railroad companies, or either of them that have created indebtedness to the State, are hereby authorized to repay any amount of the principal of such indebtedness as they have respectively created in the bonds of the State, in such amount and at such times as may be practicable; *provided, however*, that nothing in this Act shall be so construed as to release said railroad companies from any lien which the State may have on the same for any unpaid interest now due on said bonds of the State authorized to be surrendered by this Act.

SEC. 2. *Be it further enacted*, That any railroad company or companies repaying any indebtedness due the State under the provisions of this Act, are authorized to issue bonds of equal amount and denomination with the bonds of the State paid and delivered up for cancellation, as hereinafter provided, which said railroad bonds so issued in lieu of any equal amounts of State bonds shall be certified to by the Comptroller and entered in a book to be kept for that purpose with date, number and amount, and shall be a lien *pro rata* in amount and of equal validity and effect with the unretired part of the State indebtedness upon such railroad and all its property, franchises, fixtures and material.

SEC. 3. *Be it further enacted*, That in order to facilitate the railroad companies that may wish to avail themselves of the provisions of this Act in repaying the indebtedness due to the State, respectively, they, or any of them, are hereby authorized to consolidate their property in whole or in part with other railroad companies and issue bonds and stock as provided for in the second section of this Act, and may adopt the corporate franchise of either of the roads as the stockholders may elect, and each railroad company paying its indebtedness and such railroad companies as may consolidate under the provisions of this Act, are hereby authorized to determine by a vote of the stockholders of said company or consolidated company the number of Directors of such company and elect the same under the new organization, and that the said Directors, so elected,

shall, according to the by-laws of said corporation, elect one of their number President of said company.

SEC. 4. *Be it further enacted*, That the Comptroller of the State shall receive from the railroad companies, or any of them, bonds of the State in such amounts as may be presented and cancel the same in the presence of the officer or agent of the railroad company paying therein, and execute to said railroad company or companies duplicate receipts for the amount and number of said bonds so paid in, and it shall further be the duty of the Comptroller to certify on the bonds of any railroad company or companies repaying indebtedness due to the State that the same has been paid and that the so certified (bonds) are secured by first mortgage: *Provided*, that said railroad companies shall liquidate their indebtedness prior to the maturity of the bonds that have caused said indebtedness; and, *be it further provided*, that said bonds when executed by the respective railroad companies, or either of them, shall be deposited with the Comptroller of the State whose duty it shall be to deliver said bonds or any number of them to the President and Directors of the company, on the deposit by said President and Directors or authorized agent an equal amount of the six per cent. bonds of the State of Tennessee, with unpaid coupons attached, and the company's first mortgage bonds, authorized to be issued by this Act, shall have no validity or value except the Comptroller's certificate is affixed on the face of each bond, that said bond is executed and issued, and by virtue of law takes the place of a bond of the State and is a first mortgage bond.

SEC. 5. *Be it further enacted*, That the Comptroller shall be entitled to a fee of one dollar on each thousand dollars of the bonds certified as aforesaid, to be paid by the railroad company for which the same is done, and it shall be lawful for the Comptroller to discharge the duties imposed by this Act by and through an agent in the city of New York, and all the provisions of this Act shall attach to and become a part of the charter of any railroad company or companies acting under it.

SEC. 6. *Be it further enacted*, That by and with the consent of the Board of Directors of any railroad company in this State under the General Improvement Law, passed the 11th of February, 1852, and all the amendments thereto, that any person or corporation may, by paying the indebtedness of such railroad company to the State in the bonds of the State as provided for by law, be, and they are hereby substituted and entitled to all the liens against said company for the payment of said debt that the State had or has by law and the Governor and Secretary of State shall give such party or parties paying such indebtedness a certificate showing the facts which shall be evidence against company of such indebtedness to said individuals or corporation.

SEC. 7. *Be it further enacted*, That any person or persons may, with the consent and approbation of any railroad company which is indebted to, and for which the State of Tennessee holds a lien, pay the said debt so far as the State is concerned in the bonds of the State or any coupons of bonds at par, and the person or persons so paying the debt of any railroad company with the consent of such railroad company shall, upon filing with the Treasurer of this State the written assent of said railroad company, under the corporate seal of said railroad company, be entitled to have and hold all the lien or liens which the State of Tennessee had or has upon said railroad or its property, and shall have the same right to enforce the same which the State of Tennessee had, the object and

intent being to place the person or persons so paying with the consent of the said railroad company in the same position and with the same rights which the State of Tennessee had previous to and before the said payment and with full power to enforce the same.

SEC. 8. *Be it further enacted*, That any person or persons who may, with the consent and approbation of any railroad company, pay any part or portion of the indebtedness of such company, as provided in section —, shall have, hold and be subrogated in all the rights, privileges and lien or liens of the State to the extent of and in proportion to the amount of such indebtedness, with the same rights and privileges the State now has to the extent of such payment or payments: *Provided*, the passage of this Act shall not decrease the lien of the State upon any railroad of the State until the entire claim of the State is fully liquidated, or affect the interest of the present bondholders of the State: *Provided*, That railroad companies which have issued second mortgage bonds, availing themselves of the provisions of this Act, shall file with the Comptroller, bonds of the same series as those loaned to such company, for which the State holds a first mortgage lien: *Provided*, the bonds to be issued by the company under the provisions of this Act, shall not have a larger time to run than the bonds of the State thus released and cancelled.

SEC. 9. *Be it further enacted*, That this Act shall take effect from and after its passage.

F. S. RICHARDS,
Speaker of the House of Representatives.
P. P. C NELSON,
Speaker of the Senate.

PASSED, February 26, 1869.

This act is entirely consistent with all the legislation of the State since the act of February 11, 1852, in so far, as it and they, assert that the lien taken under the act of February 11, 1852, was the lien of the State, and for its benefit alone. There is not a particle of legislation in the State, which I am aware of, that indicates any thing to the contrary.

The act of January 20, 1870, amendatory of the act of February 25, 1869, is as follows:

CHAPTER XLVII.

AN ACT for the payment of the State Debt:

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That an Act entitled, "An Act to liquidate the State Debt, contracted in aid of railroad companies in the State of Tennessee," passed February 25, 1869, be and the same is hereby amended so as to allow any railrnad company which may be indebted to the State by reason of the bonds of the State loaned to said railroad company, to pay into the State, in liquidation of said indebtedness, any of the legally issued six per cent. bonds of the State of Tennessee outstanding without regard to series or number; and such payment shall, to the extent made, be a full and perfect discharge of the lien which the State holds upon the property of

such railroad company held by virtue of the bonds of the State issued to such railroad company, whether they be the same bonds or the same series of bonds, issued to said company under the Act passed February 11, 1852, and Acts amendatory thereof, or not.

SEC. 2. *Be it further enacted*, That railroad companies issuing their own mortgage bonds under the provisions of the Act which this is intended to amend, be allowed to fix the rate of interest which the said bonds of the railroad company are to bear, and all laws in conflict are hereby repealed: *Provided*, that when said railroad companies owe interest already due, coupons past due shall be taken by the Comptroller or Treasurer in discharge of such indebtedness for interest.

SEC. 3. *Be it further enacted*, That when any company under the provisions of this Act shall pay into the Treasury of the State, bonds which have been issued by the State to said company, the said bonds shall be cancelled; but, should any company, in discharge of its own debts, pay into the Treasury any bonds that were issued to other companies, that may be still indebted to the State, such bonds so paid in shall not be cancelled, but shall be held by the State as purchased bonds, retaining a lien for the State upon the road to which said bonds were originally issued, until the debt of said road to the State shall be fully discharged, when the bonds so held shall be cancelled: *Provided*, that the provisions of this Act shall not be so construed as to allow the payment and satisfaction of debts created by bonds issued by the State and upon which the State is secondarily liable, nor to the payment of the sinking fund now required by law of the railroad companies of this State.

SEC. 4. *Be it further enacted*, That this Act shall take effect from and after its passage.

W. O'N. PERKINS,
Speaker of the House of Representatives.
D. B. THOMAS,
Speaker of the Senate.

PASSED, January 20, 1870.

This act I regard as a clear exposition and construction of the seventh section of the act of February 11, 1852. All the legislation of the State, as I have pointed out in the foregoing citations from the various acts, goes upon the idea that the lien was the property of the State, and that the amount secured thereby was a *debt* to the State.

All the subsequent acts of the Legislature directing the sales of the defaulting and insolvent roads, that of July 1, 1870, July 8, 1870, December 16, 1870, December 21, 1870, and February 1, 1871, were assertions by the State, of complete and exclusive ownership of the lien taken under the act of February 11, 1852.

By reference to the acts of the Legislature cited herein, and in the book of Public Statute and Document, filed as a part of the record, the Court will readily see that the Legislature of Tennessee, before the war as well as since that time, before the

period of legislative hostility to the bondholders, as declared by complainants, had uniformly regarded the lien as the property of the State, and did many acts wholly inconsistent with the theory, that the *lien* belonged to the bondholders, or that the State was a mere trustee for the bondholders..

The act of March 20th, 1860, declaring that the amount paid by any company to the sinking fund:

"*Shall be passed directly to the credit of the party (company) having so paid the same, and be a release to said party (company) for that amount on the debt due by them (company) to the State of Tennessee,*"

is no more noticible than several others.

To allow the companies to make those annual payments years before the bonds matured, and in other bonds of the State, and these latter to be cancelled as paid in, thus paying in part, the debt of the companies, is a clear assertion and of a practical character, that the lien belonged to the State, and that the railroad companies were the debtors, and the State creditor.

After the war the State twice funded the over-due coupons on all bonds outstanding, into new bonds, and in so doing, commingled coupons taken from railroad bonds with coupons taken from bonds issued for other purposes, such as turnpike bonds, agricultural bonds, bonds to purchase the Hermitage, Capitol bonds, and bonds to raise the capital stock of her bank.

So much of a new bond as was made up of coupons cut from bonds issued originally to a railroad company, and thus blended with other coupons, was by the funding acts:

"To be charged up to the company as part of the original loan, with the same lien." Vol. 4.

JUDICIAL CONSTRUCTION OF THE ACT OF FEBRUARY 11, 1852, BY THE COURTS OF TENNESSEE.

In the case of Howard *v.* Casey, 4 Sneed, 177 (decided in 1856), the court held:

"The *lien reserved to the State* by the act of 1851–2, ch. 151, secs. 3 and 4, upon the property of railroad companies which have received State aid in the purchase of iron for their roads, does not attach upon money paid in for stock, while said roads are under construction."

In the case of McGraw *v.* Memphis and Charleston Railroad Company, 5 Coldwell, 435, the court said:

"*The lien of the State* on the properties of railroads, * * * embrace not

only the properties of the description designated in the section, which were in existence at the time of the completion of the road, but also properties of the kind designated, which have come into existence and been acquired by the company, and also such as may hereafter come into existence and be acquired by the company."

In Scott *v.* Nashville & Chattanooga Railroad Company, 7 Lea, 15, the court said:

"*The lien of the State on railroads for the security of bonds loaned under the Internal Improvement laws of* 1851–2, is superior to the rights of the holders of tax certificates, under the act of 1851–2, providing for county subscription, and making said certificates receivable for freight and passage on the road.

In the same case the court further held:

"A purchase of the road, or the State's interest therein, under the sale ordered by the chancery court at Nashville, in pursuance of the act of December 21, 1870, is not bound to receive such certificates for freight or passage on the road."

This last case, more nearly than any other of which I am aware, comes nearer to the present case. In this it was a contest between the purchasing corporation and the holders of certificates, who before and at the time of the sale, was entitled to have these certificates converted into stock, or use the same in payment of freight or passage, and sought to compel the purchasing corporation to perform the latter.

The following cases hold that the State held the lien—was owner thereof—and could enforce it against the companies defaulting: Railroad *v.* Hicks, 9 Baxt., 443; Wilson *v.* Gains, 9 Baxt., 546; Railroad *v.* Marion county, 7 Lea, 655; White *v.* Railroad, 7 Heis., 547; Exum *v.* Davenport, 9 Heis., 44: Hopkins *v.* Connell, 2 Tenn. Ch. Rep. 323. The latter decision was made by Chancellor Cooper, now a member of the Supreme Court of the State.

There is no decision in Tennessee which does not proceed upon the idea that the State owned the lien, and could enforce it for her benefit.

WHAT HAS BEEN THE ACTION OF THE BONDHOLDERS DURING THIS TIME.

When the receivers of railroads held money arising from the operation of defaulting companies, they paid the same into the treasury of the State without objection from the bondholders—this was allowed by them after the State had defaulted in the payment of interest.

The bondholders have twice funded over-due coupons for these bonds issued to railroad companies, and in doing so, confused the same with coupons taken from other bonds not issued to railroads, and also confused and blended the coupons taken from the bonds issued to one company with coupons taken from the bonds issued to another company.

The complainants prove they bought these bonds without knowing to what company they had been issued, or that they were issued under the acts of 1851–2, and amendments, until after the bonds were delivered. See depositions of Peter Geddes, T. T. Terry, Eugene Kelly, C. A. Stevens.

The evidence shows that the bonds were originally sold in every instance as straight State of Tennessee bonds without any supporting security other than the faith and credit of the State, and did originally sell, at the price of other straight State bonds, and have uniformly since the original sale, rose and fell in price with bonds issued purely for State purposes. See depositions of J. J. Craig, J. G. M. Ramsey, Columbia Powell, R. G. Jackson, Samuel Tate, C. J. McKinney, J. S. Claybrook, V. K. Stevenson, Campbell Wallace, R. T. Wilson.

The evidence shows that the uniformity in the rise and fall in the price of bonds prevailed between bonds issued solely for State purposes (such as those issued to build the Capitol), those issued to *solvent*, and those to *insolvent* companies.

No holder of an over-due coupon ever presented the same to a railroad company and demanded payment, but always applied to the Treasury of the State, or the State's financial agent in New York.

The bondholders have encouraged actively, by correspondence with the Governors, the various measures adopted by the State, and which were being executed by acts of the Legislature during these years, and have acquiesced in the policy of the State relative to her debts, and tacitly admitted the construction which the State put upon the internal improvement acts. Vol. 1, p. 515.

In the year 1877 there was a long correspondence (which is exhibited in the record, Vol. 1, pp. 515 to 529), between the bondholders and the Governor (Jas. D. Porter), in which the bondholders refer to the debt as that of the State. They deplore the "*disordered condition of the public debt of the State of Tennessee,*"

and express confidence that "a permanent adjustment of the debt on a basis equitable to the holders of it and honorable to the State" can be made. They ask the Governor:

"*To recommend to the Legislature to appoint a commission to come to this city (New York) and confer with the creditors of Tennessee with the view of bringing about such an adjustment.*"

They recommend six measures to be enacted, these look alone to the revenues of the State, and also recommend funding past due coupons and bonds.

After the sale of the defaulting roads, under the act of December 20, 1870, and after the act of February 25, 1869, by which the solvent companies were enabled to make mortgages and to pay to the State the amount of bonds issued to them originally, and they had done so, by letter, dated August 1, 1877. Vol. 1, p. 526.

Mr. Geddes, who is a complainant herein, and who represented himself and other bondholders, wrote:

"THE DEBTS OF THE RAILROADS TO THE STATE MAY NOW BE REGARDED AS PRACTICALLY SETTLED, what remains is simply a question between debtor and creditor. *Freed of the complication which grew out of these railroad debts,* the discussion of the *debt* question will be very clear and simple henceforward."

In a letter of August 23, 1877 (vol. 1, page 30), Mr. Geddes says:

"Since then (August 8), I learn that the Mississippi and Tennessee Railroad Company have voted to pay off *their debt to Tennessee.* This practically settles up all advances made by the State to railroad companies, and reduces the whole State debt question to one between the people of Tennessee and the investers in their public debt."

The railroad companies in Tennessee, after the passsage of the act allowing them to make mortgages and pay their debt to the State in State bonds, had from time to time accepted the provision. When the last one of the solvent roads had done so, and all the purchase money had been paid for those sold at a chancery sale, on August 27, 1877, Mr. Geddes writes to the Comptroller of the Treasury of Tennessee:

"There is little doubt that the last of Tennessee's advances to the railroads within her borders, will be paid off early in the fall, thus freeing her and her credits too, for that matter, from a very troublesome disorder."

Meaning by the latter, that the credit of the State had suffered by reason of her connection with railroads, in being compelled to issue and advance bonds to them to sustain their credit.

That the bondholders knew what was transpiring in Tennessee relative to this debt, and approved it, there can be no doubt. The record shows that the holders of Tennessee bonds in Europe and America, had a committee in New York who looked after their interest in these matters; and that the committee was, from time to time, making propositions and suggestions to the State through its executive officers, and that these propositions and suggestions were based upon what had already been done.

PART VIII.

The differences between complainants and defendants, are these:

The complainants say that the legislation of the State of Tennessee, in the act of February 11, 1852, was effectual to fix upon the railroads respectively a lien, not merely *for the indemnity* of the State of Tennessee, but *also to secure to the bondholders* payment of the State bonds issued in construction of each railroad, and that the State was and is a trustee of this lien for the benefit of the holders of said bonds, and that this arises by the express contract to that effect in the statutes ,as well as by necessary implication from the relation of the parties.

The defendants say that those laws create a lien in favor of the State solely, and furnish no security to the bondholder, that the lien taken was wholly intended as indemnity to the State, and that by lawful acts between the State and the railroad companies, the liens have been discharged, and exist no longer.

The main business of this argument, and of this Court, is the interpretation of these statutes. This Court has said:

"The meaning of the particular words may be seen by examining the whole act." Platt *v.* Union Pacific Railroad Company, 99 U. S., 56.

Sir John Nicholl says:

"To arrive at the true meaning of any particular phrase in a statute, the particular phrase is not to be viewed detached from its contexts in the statute; it is to be viewed in connection with its whole context, meaning by this, as well the title and preamble as the purview or enacting part of the statute." Butt *v.* Butt, 3 Adams, 210.

Chief Justice Marshall said:

"If in a subsequent clause of the same act provisions are introduced which show the sense in which the Legislature employed doubtful phrases, previously used, that sense is to be adopted in construing these phrases.' Alexander *v.* Mayor, 5 Cranch, 1.

In the case of Platt *v.* Union Pacific Railroad Company, cited herein, the Court said:

"There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. * * In endeavoring to ascertain what the Legislature meant, we must, as far as possible, place ourselves in the light that the Legislature enjoyed, look at things as they appeared to it, and discover its purposes from the language used in connection with the attending circumstances.

The section of the acts of the Legislature which complainants rely upon as definitely giving the lien to the bondholders, are the third and fourth.

Section 3 is as follows:

"That so soon as the bonds of the State shall have been issued for the first section of the road, as aforesaid, *they shall constitute a lien upon said section so prepared as aforesaid*, including the road-bed, right of way, grading, bridges, masonry, upon all stock subscribed for in said company, and upon said iron rails, chains, spikes and equipments, when purchased and delivered, and the *State of Tennessee*, upon the issuance of said bonds and by *virtue of the same*, shall be invested with said lien or mortgage without deed from the company, *for the payment by said company of said bonds, with the interest thereon, as the same becomes due.*"

Section 4 extends the lien to the successive sections of the road, each as completed, upon the same terms and conditions:

"And upon the issuance of said bonds the State of Tennessee shall be invested with a like mortgage or lien, without deed from said company, upon said stock, and upon the said first and additional section or sections of said road so prepared, upon the rails and equipments put or to be put upon the same, *for the payment of said bonds and the accruing interest thereon.*"

Then the act proceed as follows:

"And when the whole of said road shall be completed, the State of Tennessee shall be invested with a lien, without a deed from the company upon the entire road, including, etc., * * *for the payment of all said bonds* issued to the company as provided in this act, and for the interest accruing on said bonds."

The act then provides that after the first issuance of bonds:

"It shall not be lawful for said company to give, create or convey to any person or persons or body corporate whatever any lien, incumbrance, or mortgage of any kind, which shall have priority over or come in conflict with the *lien of the State*, herein secured, and any such lien, incumbrance or mortgage shall be null and void as against said *lien or mortgage of the State*, and the *said lien or mortgage of the State* shall have priority over all other claims existing or to exist against said company."

It will be noticed that the lien retained is everywhere called "*the lien or mortgage of the State*," and in the first section it is declared to be "created in favor of the State," and nowhere is it expressly stated to be held by the State as *trustee* for the ben-

efit of the bondholders. There is an absence of the bondholders exhibited everywhere throughout the act; he is nowhere mentioned, and nowhere provided for or alluded to. The railroad companies are not required to pay *him* the interest accruing semi-annually, or to take from him the coupon paid; they are required to pay the *interest* into the Bank of Tennessee "*fifteen days*" before the interest on the State bonds is due the holders thereof.

The receiver of the road, when appointed by the Governor, is not required to pay out of the income in his hands any of this semi-annual interest accruing on the State bonds, for in fact the receiver is not appointed until the railroad has made the default, and the act provides that the Comptroller, upon his warrant upon the State treasury, shall pay any sum necessary to meet the interest for which the railroad company is in default. If the railroad company defaulted, the act provided for another mode of payment, out of the State's general treasury, and therefore when the receiver came to settle his accounts, having realized from the operation of the road:

"A sufficient sum exclusive of costs and expenses incident to said proceedings, to pay off and discharge the interest as aforesaid due on said bonds, which being done, the receiver shall surrender said road and equipments to said company. The Comptroller shall from time to time settle the accounts with the receiver, and the BALANCE shall be deposited in the treasury of the State."

As respects the word "balance" our adversaries in the court below fell into a grave mistake. They said, and will probably continue to say, that the word "balance" has reference to that sum which is left in the hands of the receiver after the payment of the costs and expenses of operating the road, *in addition* to the interest on the State bonds issued to the company of which he is receiver. In other words, that it is the duty of the receiver to pay from the gross receipts the costs and expenses of operating the road *and the interest* on the State bonds issued in aid of that road, and the sum then left in his hands constitute the "balance" to be paid into the treasury. The default of the railroad as respects the payment of the interest on bonds must take place fifteen days before the coupons mature, and as these mature semi-annually, say in January and July, the default must occur fifteen days previous to these dates. Until this default occurs the Governor would have no power to appoint a

receiver. So when it occurs, the Governor selects a suitable person, takes of him the required bond, and issues his writs to put him in possession of the railroad. Now while all this is transpiring, and certainly before the receiver could collect much money from the earnings of the road, the coupons would mature. The statute did not overlook these important facts, and provided:

"The Comptroller is authorized, *and it is made his duty,* upon his warrant, to draw from the treasury *any sums of money necessary to meet the interest on such bonds as may not be provided for by the company.*"

So the interest has been paid by the State, and the State is operating the road for its own indemnity.

The question arises just here; How long shall the State continue to hold and operate the road? The statute says:

"Until a sufficient sum shall be realized exclusive of the costs and expenses incident to said proceedings, to pay off and discharge the *interest aforesaid.*"

What interest *aforesaid?* Certainly that which had been defaulted, that which the State has paid—

"Which being done, the receiver shall surrender said road and fixtures and equipments to said company."

The realization of a sufficient sum of money by the receiver to pay expenses and the defaulted interest, limits his right to continue in possession. Having paid "costs and expenses" he then must pay the "*interest aforesaid,*" already paid by the State to the bondholder—of course he must pay it to the State. The receiver is not allowed to accumulate in his hands any "balance" over and above costs and interest. There will be no "balance" to be deposited in the treasury of the State if the statute is faithfully executed, in the sense in which our adversaries define "balance." The "balance" referred to in the statute, and which is to be paid into the treasury of the State, is the "balance" after deducting "costs and expenses," and are the results of settlements made "from time to time."

The State having paid the interest on the bond, certainly the receiver has no reason to hunt him up—the bondholder—or to see him, or to ascertain the whereabouts of his coupons—his only duty is to repay the State "in liquidation of the unpaid interest"—"unpaid" as between the railroad and the State, but *paid* as respects the bondholder.

The receiver having done these things, has kept the obliga-

tions of his official bond, which he executed *payable to the State*, obligating himself to do these things, which obligation alone defines his duties, and they are not defined at all in the Statute.

Complainants foreseeing that their view of this section might not be adopted, then assert that our view of it will not subserve our interests, because the statute does not say that the "balance" shall be *paid* to the State, but "to deposit it in the treasury of the State," and that the word "deposit" implies a special deposit for safe keeping. All this falls to the ground, in view of the important fact that this act presupposes that the railroad company had made default in the payment of the interest, that the State had paid it, and now the receiver appointed by the Governor, had in his hands sufficient money to reimburse the State in the amount so paid out. What should he do with it? *Deposit* it for safe keeping in the treasury of the State. Who will the Treasurer hold it for, the bondholder? but he has been paid. The act is clear, he is "to deposit it in the treasury of the State." In the language of the act:

"Toward the liquidation of such unpaid interest."

This act was passed when the bonds of the State of Tennessee were selling above par. Her credit good in the money markets of the world, and continued so for many years afterwards. Certainly the State never passed the act in anticipation of its future insolvency, and legislating upon that theory, was careful to provide a fund for one class of its creditors.

Certainly no member of the Legislature of 1851–2, regarded that body as legislating upon the contingency of the insolvency of the State, at some future time. The fact that the State would at some day fail to meet the interest accruing on her bonds, was never anticipated, and was therefore not provided for, and having occurred, there is no remedy provided for it.

The law did contemplate that the railroad companies might make default, and that the State might have to pay the coupons and bonds, and would thereby be the only *injured* party; hence the remedy reserved to the State to appoint a receiver for *its* security, and requiring the receiver to account to its treasury for any moneys belonging to the company in his hands. The receiver was to be appointed by the Governor, not at the instance of the bondholders—not by a court of equity. The fact that a

State was the trustee, precluded any such idea, as it could not be brought into court *in invitum*. The Legislature supposed when it had provided for the payment of the bonds and coupons out of the treasury of the State, that it had secured the bondholders beyond all peradventure, and that the necessity for any action on his part to secure payment, was legally an impossibility, hence there are no provisions in the act allowing his presence—no remedies reserved to him. He could not compel the appointment of the statutory receiver, nor does the act require that the receiver and he should at any time, meet each other.

The sixth section likewise ignores the bondholders, it provides that if the company shall fail to pay the bonds as they mature, the Governor shall cause the Attorney-general, a state officer, to file a bill against the defaulting company, and directs that the court shall make all such orders and decrees in the cause necessary to receive (secure) the payment of said bonds and interest, and to *indemnify* the State of Tennessee against any loss on account of the issuance of said bonds, by putting the railroads in the hands of a receiver, ordering a sale of all its property and assets, or *in such manner as the court may deem best for the interests of the State.*

"*To indemnify the State,*" "*best for the interest of the State.*" The State and the State's interests, are all mentioned, and emphasized in all the remedial agencies of the statutes. No one else is mentioned, or has conferred upon him any of these remedies. The act proceeds upon the idea that the State has kept faith with the bondholders and has paid the bonds, and to reimburse itself is given these remedies. The *State* is the solicitude of the statute.

The bill required to be filed by the Attorney-General against the railroad company defaulting in the payment of its bonds is to be filed "*in the name of the State of Tennessee,*" not as trustee for the bondholder—these are not required to be parties. The litigation provided for is purely litigation between the State and the defaulting railroad company, and any decree had or made must be limited to the parties litigant. The only duty owing to the bondholder is the duty of the State to pay him his interest and bonds—these he secured not by the statute, but by the bond itself. The entire scheme, as exhibited in the statute, is upon the basis and idea that the railroad company owes the State and

the State owes the holder of her bonds, and if the railroad fails to put sufficient funds in the hands of the State with which to meet the interest or bonds, that the State shall pay them as they respectively fall due. The fallacy which lies at the bottom of complainants' theory and argument is, that the State foreseeing its future dishonor or inability to meet its just liabilities, was securing one class of the holders of its bonds. There is no such rule of interpretation or construction laid down in any law book.

The seventh section creates the so-called sinking fund. It enacts "that at the end of five years after the *completion* of said road," the company shall set apart one per centum per annum upon the amount of bonds issued to said company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the company shall pay into the treasury of the State, after assigning them to the Governor, and for which the Governor shall give the company a receipt, *and as between the State and said company*, the bonds so paid in shall be a credit on the bonds issued to the company, and the bonds so paid in, and the interest accruing thereon from time to time, shall be held and used by the State as a sinking fund for the payment of the bonds issued to the company, and should said company repurchase any of the bonds issued to it under the provisions of this act, they shall be a credit, as AFORESAID, and cancelled, and should said company fail to comply with the provisions of this section, it shall be proceeded against as provided "in the fifth section of this act."

The Legislature of 1856 saw the error of this section in so far as it required the payment to the sinking fund to commence five years "after the completion of the road," as the road might not be completed at all, or in time *to relieve the State*, and hence the act of February 21, 1856, requiring the payments to begin:

"At the expiration of five years from the issuance or endorsement of these several bonds."

This change was made in the interest of the State.

This seventh section allowed the railroad companies to pay into the so-called sinking fund *any* bonds of the State. The State had out at that time, besides her railroad bonds, Capitol bonds, turnpike bonds, agricultural bonds, bonds issued to raise

the capital stock of her bank, and Hermitage bonds, all these were her own liabilities, and bore different rates of interest, and of which she solely received the consideration, and under this seventh section these bonds might be paid in to the sinking fund.

In this view, this so called sinking fund was fast becoming impracticable, hence the act of March 20, 1860, allowing the payments to this fund to be made in *cash* (section 5), or in:

"Like character of bonds, that may have been issued by the State for said company."

These payments, by this act (sections 1, 2 and 7), were to pass:

"Directly to the credit of said company or corporation, and be a release to said company or corporation from that amount *due by them (it) to the State.*"

I refer to these changes to show that the State regarded herself as having full power and ownership over this lien, before she made default on the payment of her obligations; and also to say, that as respects bonds issued after this act of March 20, 1860 (and complainants have filed many such), certainly these were taken with notice, that the railroad companies might pay in any bond, and thus secure an absolute release from its original debt, and herein the one class of bondholders may have different rights from the other, and require different decrees.

Going back to the seventh section as it stood before these amendments, let us ascertain its intent and object.

It recognizes and affirms the right of the railroad company to *pay*, and that of the State to *take* any bonds of the State in *payment* of the original obligation.

But, say our adversaries, if the payment was made on a bond not issued to the company, that such a payment was only good:

"As between the State and the company making the payment."

And not a payment as respects the bondholders. If our theory to the effect, that the railroad company was only indebted to the State under the scheme as set out in the statute, is correct, then the debtor (the railroad company), has paid its creditor—(the State), in the very mode and manner specified in the contract and scheme, and this ends it.

The words "*as between the State and said company,*" is seized upon and used for the purpose of showing, by implication, at least, there was another debt—the bondholders—not affected by

this payment. This argument proves too much, it implies that the railroad company, in the scheme of the statute, undertook to pay twice—once the State, and once the bondholder. The latter could be *paid* only in *money*, and by taking up his bond, while the State could be *paid* on her own bonds, and the words "pay" and "payment" throughout the statute, refer to the latter. The deposit of the semi-annual interest by the railroad company is called in the statute a "payment"; handing the required amount of State bonds to the treasury, in the seventh section, is denominated "paid in," and requiring the company to do so, is expressed in these words: "the company shall PAY into the treasury." The act of putting the amount of the interest into the Bank of Tennessee, though this put nothing in the bondholder's pocket, is denominated a "payment" and fulfills the requirement "to pay," and when done, is denominated "has been paid."

The Court will see, upon consideration of the statute, that its entire machinery is to take from the *railroad* and put *into the State*, it fails to work *towards* the bondholder, practically it put interest twice a year into the bank to be used by the State, once a year it put State bonds into the State treasury.

The bondholder is *alibi*, as regards the scheme of the statute. the machinery thereof does not so much as work in *his* direction. He is not a beneficiary under the entire scheme. He stands upon his contract as expressed in the bonds he bought and holds.

The theory that the lien was taken for a double purpose, to-wit: to secure the bondholder *and* indemnify the State, and that the railroad company *must* pay to the bondholder in money, and *might* indemnify the State in her own bonds after she had paid the bondholder in *money*, goes to pieces, in view of the fact that the State allowed and compelled payments on the *principal* debt to be made to her in any of her bonds *before* she had paid one cent of the principal debt, and compelled this to commence in five years from the issuance of the bonds.

If it be true, as our opponents contend, that a payment of bonds into the treasury by a railroad company was no payment at all, and that a payment of the semi annual interest into the Bank of Tennessee was no payment at all as regards the bond-

holder, and that a railroad company having done these things, might be compelled to pay the bondholder, then the act becomes a snare to railroad companies instead of "aiding" them by a "loan of bonds." Such view is remote to the conception of the Legislature and inconsistent with the objects and purposes of the scheme.

It must be quite clear that the railroad companies became obligated by the statute to pay but *one* debt, and the lien was taken to secure *this* debt, and the scheme was for the railroad company to commence paying the debt at once, by putting the interest semi annually accruing into the hands of the State, and by putting the bonds of the State into the treasury each year, and each of these acts reduced the amount secured by the lien *pro tanto*.

We admit that the sinking fund organized under this statute is different in some respects from what is now so called. The latter are investments and reinvestments, so that the accumulation will meet the debt when matured by selling or collecting the securities. The act never contemplated keeping the bonds of the State in the treasury, and at the maturity of the outstanding bonds loaned railroad companies, to sell them to pay the holders of other bonds. The undertaking was this, to the extent that a railroad company paid State bonds into her treasury, the State assumed the payment of the bondholder, and returned to her treasury bonds paid in by the railroad company, not to sell them, but to keep them alive as against the company, to which they had been issued originally, and thereby preserve her lien and rights. Bonds issued to one company, and paid in by another, are not *paid* bonds as respects the company to which they were issued—ordinary prudence would have dictated their preservation. But it was a part of the scheme, and thereby a part of the contract, that each railroad company might pay *its* debt in this way, and the bondholder is bound by it, and such a payment is a discharge of the lien upon the property of the railroad company.

That railroad companies might pay any legally issued State bond into the sinking fund, and thereby discharge their obligation, is the very spirit of the statute, and all there is of the so-called sinking fund.

In the court below, several ingenious gentlemen engaged in these causes, attempted the solution of the Tennessee sinking fund, but all failed—one said it was "peculiar;" another said "it has no likeness to any other;" another said "it shed no light on the meaning of the acts of 1852." The fact is, it is no sinking fund scheme at all; it was not designed to make the railroad companies pay in money the holders of the State's bond. It is what it is, the State's provision, to enable her to pay the bonds at maturity, without loss. So soon as any company paid to the State in amount of bonds equal to the amount issued to it by the State, the railroad bond debt of that company would be paid. This is the whole of it.

If the lien reserved in the statute was exclusively the lien of the bondholders, in this aspect the right of the railroad company to discharge its debt in the mode indicated in the statute is equally clear, and this being a part of the contract, whether it be a "burden or a blessing" to the bondholder, he must stand to it.

The State was intended to be the beneficiary of the sinking fund, it was intended to secure her, to strengthen her ability, and this view is confirmed by a reference to the thirteenth section, in which bonds of the State are supposed to have been fraudulently obtained by a railroad company, in which case a bill was to be filed in the name of the State, all the property of the road sold, and the proceeds paid into the treasury, to be invested in stock, as provided in section 7.

So also the fourteenth section confirms this view in providing that in the event any railroad company is sold under the provisions of this act, if necessary to protect the interest of the State, it shall be bought by the State, shall be operated by a receiver, who shall run the same. Would it be held that the purchaser at a sale under the thirteenth or fourteenth sections did not get a clear and unincumbered title discharged of all liens?

The main reliance of complainants, and the phrases in which they seem to place their greatest confidence, are these:

"*They (the bonds), shall constitute a lien upon said section.*"

"*The State of Tennessee shall be invested with a lien or mortgage for the payment by said company of said bonds, with interest thereon as the same becomes due.*"

Or as set out in the fourth section:

*"The State of Tennessee shall be vested with a lien upon * * * for the payment of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds."*

They say, first, the BONDS "*constitute*" the lien, and the lien is transferred, with them, to successive holders. Secondly, they say, it is not the companies obligation to the State that constitutes the lien, because this would be indemnity to the State alone. Thirdly, they say, that the obligation imposed is, that the railroad company is to pay the *very* bonds loaned to it and sold by it, and not other bonds issued by the State for her own purposes, or to other railroad companies; and thereby, they say, they have a beneficial interest in this lien, which is held in trust for them by the State. Of course, it follows as a legitimate consequence, and was claimed in the court below, that the bondholder could bring a direct action against the raidroad company, and recover either interest or principal, and could enforce the lien by judicial proceedings, and sell the property for the satisfaction of his debt.

It is further claimed, that the State is nominally the debtor to the bondholder, but it is in fact the surety of the railroad company, which is the real debtor, and therefore, on principles of equity, the security taken by the State was equally for the benefit of the bondholder and the State.

When does the lien first come into existence? Certainly when the Governor of the State hands the bonds over to the railroad company; for, if at that moment they were lost, the State would have the lien. The language is:

"*That so soon as the bonds of the State shall have been issued* * * * they shall constitute a lien."

To this point, the lien belongs to the State. This, without more, starts the lien, in the State exclusively, and there is no third person in the transaction. At this point it is clear that the borrower of bonds—the railroad company—becomes obligated to return the bonds to the State, or to return such other as may be agreed upon, and the agreement is, that the railroad company may return *any* bonds of the State. This feature of the contract is important to the railroad company. It may be it cannot return annually the identical bonds or any part thereof.

The holder may be in Europe, and the company cannot find them, or he may decline to part with them, or knowing that the railroad company is compelled to have them, and that none other will answer its purposes. He puts up the price to an exorbitant sum. This is an *essential* feature in the contract, to the railroad company taking the loan. And while matters stand thus, between the State and the railroad company, no one else having come into the contract, no one can doubt the rights of the parties to be other than I have stated them. It is insisted, however, that the moment the bonds loaned to the railroad company, are negotiated by it, then *eo instanti* this right to pay in *any* bonds of the State, drops out of the contract, and that the railroad company thenceforward must lose this important and beneficial part of its contract, and must thereafter pay the bondholder alone in money. Does the fact that the bond has been sold by the company, of itself work out this altered condition? What part of the statute indicates that the sale of the bond, is to unsettle the terms, existent, at its inception, and accomplish such changes in the rights of the railroad company? It is true, that the transaction contemplates a sale of the bonds by the railroad company, but it is not true, that the sale is to change the contract, or that the statute contemplates any such result. The fact that a sale was contemplated, is conclusive in our favor, of the other fact, that the statute no where provides that in the event of a sale of the bond, then this contract is to be otherwise, than as it stood between the State and the railroad company at its inception. Whatever was the contract between the two original parties, it remains and continues to the end. It makes no provision for new rights or for new parties. It does not make additional provisions—beneficial—to the subsequent purchaser of the bonds, or to take away any of the beneficial terms of the contract from the railroad company, when the bond is sold. While it anticipates a sale of the bond, this fact is not made to change the literal terms of the contract, as it stood, between the State and railroad company. It does not contemplate that the presence of the buyer of the bond will increase or diminish the burdens of the original undertaking. It proceeds upon the idea that the statute was not made at his instance, nor for his benefit, and that he is not concerned therein, that he has bought in the open market a bond of the State, resting solely on its

faith and credit, and that no interest—legal or equitable—was assigned to him by reason of his purchase; and especially that his purchase of the bond did not impose new duties on the railroad company. This mortgage as it stood, at the time the bonds were issued, in its nature, qualities and parties, was not to be changed. Had the intention of the Legislature been to given thelien to the bondholder, it could and would have said, "and upon the sale of the bonds so issued, the lien taken by the State shall be and enure to the holders of the bonds, and be enforceable against the railroad companies, at their option," or language to that effect.

Our opponents must disregard all the machinery of the statutes, its practical workings and various sections, in determining the extent and qualities of the lien, and sieze upon one phrase or sentence, and make this give color and complexion to all its other parts. The case of the United States *v.* Union Central Railroad Company, 91 U. S., 84, furnishes a similar effect. The language of the statute was:

"*That the grants are made upon the condition that said company shall pay said bonds at maturity.*"

The bonds referred to were those of the United States, loaned to the railroad company to be sold, the court substantially held that the company was bound to pay the amount of the bonds to the United States, and not to the holder, as the statute seemed to imply.

We too, might with equal propriety, sieze upon the single expression in the first section of the act, in which it is declared that the lien is:

"*Created in favor of the State.*"

But, say our adversaries, the lien is vested in the State "*for the payment by said company of said bonds,*" and this phraseology becomes their sheet anchor. We have just seen that Congress used almost the same words to express the same idea: "that said company shall pay said bonds at maturity," is the language of Congress. This Court has held that the Congressional scheme was one of indemnity to the United States. This act of Congress also uses the words "pay" and "payment in bonds" in the sense of returning to the lender of bonds the same amount of bonds, and this peculiar expression does not belong exclusively to the Tennessee statutes.

"*Payment,*" as the word is used in this statute, refers clearly to the act of "paying into the treasury of the State" an equal number of State bonds, and not the payment of the identical bonds in money to the holder.

The act does not leave us at liberty to define the word "payment" in its usual sense, but distinctly define its meaning as used, and tells us how a "payment" can and shall be made, when it shall be made, and in what funds it shall be made. In other words, it requires certain things to be done, which, when done, it denominates a "payment." It is a dictionary unto itself, as most other complicated statutes are.

The cases of Railroad Companies *v.* Schulte and Chamberlain *v.* St. Paul Railroad Company, 92 U. S., 299, clearly and definitely settle the doctrine that a creditor has a right to claim the benefit of a security given by his debtor to a surety for the latter's indemnity, does not apply in a case like this. In the latter case this Court said:

"The general doctrine that a creditor has a right to claim the benefit of a security given by his debtor to a surety for the latter's indemnity, and which may be used if necessary for the payment of the debt, is not questioned. The security in such cases is the nature of trust property, and the right of the creditor arises from the natural justice of allowing him to have applied to the discharge of his demand the property deposited with the surety for that purpose if required by the default of the principal. In this case the deed and mortgage to the State were not intended to create a trust in favor of the holders of the bonds. The State was primarily liable to the bondholder, and it was only as between her and the company that the relation of principal and surety existed."

We concede that the bondholder finds in the face of the act the words that the lien is "for the payment of the bonds and interest."

To this we reply in the language of the Court:

"Words standing alone in a statute may properly be understood to pass a beneficial interest will not be regarded as having that effect if the context shows that they were not so intended."

If we could see nothing more in the act than these expressions, our case would be hopeless, but in 9 Otto, 56, this Court said:

"The meaning of the particular words may be seen by examining the whole act."

If we regard the *bonds* loaned by the State to the railroad companies as so much *money* loaned, as they are regarded in the

case of Missouri, 2 Dillon, 189, and Woodson *v.* Murdock, 22 Wall., 351, then the expression becomes exact and proper, and that they were so regarded mentally by the author and the Legislature, is rendered almost certain by expressions all over the face of the act regarding the loan of bonds as "a debt due the State," and calling a return of bonds to the treasury "a payment."

These expressions have passed the criticism of this court often without a comment as to their unfitness to convey the idea we maintain.

Let us try the theory that the lien was taken for the payment of the *very* bonds loaned to the company by a test provided by the statute itself, and which is crucial.

Suppose, as is provided in the thirteenth section, that bonds have been obtained fraudulently by a company, OR, that the company has failed to pay either the interest or the sinking fund, and the State has collected the same by a receiver, as provided in the fifth and seventh section of the act of 1852, and has put the same into her treasury, OR, that the State has instituted proceedings under the fifth section of the act of February 21, 1856 (page of record 2198), and sold the property of the company, would any one have the temerity to say that in either of these conditions a lien still existed in favor of the bondholder, and that the property had been sold subject to the bondholders' incumbrance? Could the State institute and carry to final decrees and sale of property in this proceeding? The statutes so provide. On what theory is she allowed to do this? The answer is one, and plain, "*by enforcing the lien.*"

I have said, and I repeat, that provision of the statute which compels the railroads to pay the interest to the State semi-annually, under a penalty of a seizure of its property by a receiver—that provision of the statute which compels the railroad companies to pay bonds annually to the sinking fund, under the penalty of having its property *seized or sold, and that too, before the State has paid any part of the principal of its bonds issued to these companies, and long years before they are in fact due, necessitates* the conclusion that the State is the *creditor* of the railroad companies, and the owner of the lien. The statute throughout allows the *State* to enforce all the liens, sequester all the in-

comes, take all the proceeds, either of *sale* or sequestration, and transfer the property to purchasers. These rights are the highest evidences of *creditor* and *lien owner*—the highest known to the law—are legal conclusions of the relations of the parties, against which there can be no averments or arguments. It needs neither elaboration or illustration—the result is conclusively settled in the statement.

It is indubitable that these rights of entry and ouster and of sequestration and sale given by the statute, *were given for the sole purpose, and are the remedies* to enforce the lien for the payment of *the debt* secured by the lien or mortgage, and none other, and it is equally clear that all these remedial agencies and statutory machinery, when put in full motion, simply result in collecting and paying *a debt due the State,* which debt was created by a loan of bonds made by the State to the railroad companies.

The *principal* and *interest* of *this* debt are *alike* secured by the mortgage or lien, and the remedies provided by the statute result in putting *both* in the treasury of the State. If this be a lien or mortgage to compel each railroad company to pay to each bondholder the *very* bonds loaned it by the State, and also to pay to each bondholder the interest semi-annually accruing on his bond, its modes provisions and ways for attaining these ends are most perverse, and less calculated to accomplish these objects than any presented in any book on Mortgages in several centuries. Truly the law is a great *art* as well as science.

The scheme of the whole statute—its practical working—when applied, the property of a defaulting railroad company is to reimburse the State and secure her against loss. Not to take up from the holdors the identical bonds loaned the company by the State, but rather to return to the State an *amount* of bonds equal to the *amount* originally loaned by the State to the company. There is no defect in the scheme. It did not work out the results anticipated, because of the war.

So far, I have been considering the various sections of the act, omitting the 12th, which is esteemed the most important, and is as follows:

SEC 12. Be it enacted, "That the State of Tennessee expressly reserves the right to enact by the Legislature thereof, hereafter, all such laws as may be deemed *necessary to protect the interest of the State, and to secure the State against any loss in consequence of the issuing of bonds under the provisions of this act,* but in such manner as not to impair the vested rights of stockholders of the companies."

This section may be considered in two aspects:

1. As a help and factor in the proper interpretation of the various sections of the act of February 11, 1852.

2. As standing apart from the other sections and reserving to the State, definite and indefinite powers, for future legislation, in respect to these matters.

Considering it in the first aspect, it might be said that the reservation of power included in this section, is purely against the railroad companies, for the reason that no other had any interest therein, this view proceeds upon the idea that the State owned the lien, and that the bondholders had no interest therein.

This section is entirely consistent with that view, and quietly affirms our contention in that respect, and is in strict harmony with the entire act, as interpreted by the defendants, and conflicts with the interpretation of complainants. It only limits the powers of future legislation so as not to "impair the vested rights of the stockholders." Why this limitation, and regard for stockholder's rights, and no equal regard for bondholder's rights? It cannot be claimed that the Legislature was partial to the one and despised the other. The reason it failed to limit its powers as respects the purchaser of the bonds, was that it never, for a moment, conceded that he had any vested rights to be provided for. To hold otherwise is to maintain that the Legislature having expressly, intentionally and consciously given the bondholder a lien, it immediately set to work, to impair and imperil it, or at least, make it dependent upon future legislation, a floating right, that had an existence to-day, and none to-morrow, resting on the "whim and caprice" of future legislation.

It is not a sufficient answer, in the face of the unlimited power reserved to the Legislature hereafter to enact "all such laws as may be deemed necessary to protect the interest of the State, and secure the State against" any loss, etc., to say that the Legislature reserved to itself all powers to do any thing *except* impair the rights of complainants. The language is broad enough to do any thing under it, and the power to inhibit the Legislature from passing any laws it may deem necessary, is not found in this section. *It forbids nothing*, it allows any thing and every thing "deemed necessary." There is no limitation upon its exercise, in this legislative contract with the bondholder,

if he is a party to it. The limitation claimed must be found elsewhere. And our adversaries say that it is found in the clause of the State and Federal Constitutions forbidding the impairment of the obligations of contracts, but this could have no application in instances where, upon the face of the contract, the right to impair had been reserved.

If the bondholders took any security or benefit, under any section of this act, they did so with full view of the whole act, and with notice of its every part, especially the reserved power of the State to legislate in future at discretion for the interests of the State.

Complainants entrenched themselves in the court below in some such position as this, as respects this twelfth section, claiming and admitting that whatever the State could have done, in the absence of this section, it can do under it, and whatever it could not have done without this section, it cannot do under it. This simply renders the entire section a nullity—it gives nothing, it takes away nothing.

The solicitude of this section, as of all the others of the entire act, is the *State*, her interests and welfare. The State, sovereign in many respects, unsueable, is dictating to a railroad company the terms on which she will aid railroad enterprises.

She was binding herself to issue and loan to these companies many millions of her bonds, which she alone was bound absolutely and in all events to pay: she in turn was demanding of the railroad companies all the security possible, present or future, existent or to exist, which they could give, realizing that the risk was hazardous in the extreme, and that no wisdom could compass the situation in its details, and that no prescience could foresee and foreknow the developments of the future, or foretell the results of the scheme then organized, she resolved to be unfettered and unembarrassed in her future legislation, so that, if one scheme failed she could organize another, and under all conditions and circumstances be mistress of the situation.

The statute recognizes that the trustee is a *State* clothed with powers of legislation, possessing the attributes of sovereignty, and stipulates that she is not to be shorn of these by any thing said or done therein or thereunder.

The State—the trustee—does not stipulate that she will be a mere trustee to hold and manage the trust fund according to

previous agreement; on the contrary, she demands recognition as a State, which is conceded, demands that no "jot or tittle" of her law-making capacity shall be abridged, and that in all respects she shall stand untrammeled with the absolute power "to enact all such laws as may be deemed necessary" to protect her interest and secure her against loss.

These powers reserved, are merely commensurate with the dangers and uncertainties to which the whole scheme was exposed in its future existence, and the reservations are in keeping with the dignity of the contracting party. Involving as she was more than a million of population, and hazarding millions of dollars, in these laudable enterprises, she contracted with all parties concerned that she should stand sole judge of what would be necessary to protect her interest and save her from loss, and having determined these, to embody them, and have them enacted into laws, and execute them.

Out of the vast armory of weapons conceded to her, she has used but these, and these only in self defense, and when she had "retreated to the wall."

In Shields *v.* Ohio, 95 U. S., 324, the court said:

"It is urged that the purchase here in question, was property held by a vested right, and that its sanctity as such would not be invaded. The answer is *concensus facit jus.* It was according to the agreement of the parties."

In Miller *v.* State, 15 Wall., 475, the court said:

"But it may be affirmed, that the reserved power may be exercised, and almost to any extent, to carry into effect the original purposes of the grant."

Head *v.* University, 19 Wall., 526: Head had been elected professor of "mathematics and librarian for six years, from July 5, 1856, *subject to law*," at the end of four years he was discharged by an act of the Legislature, vacating all the chairs of professors, this court said:

"The plaintiff was elected a professor, and it was resolved that he should hold his office for six years from July 5, 1856, subject to law. The judge at the circuit court held, and we think correctly, that this expression meant subject to whatever law the Legislature might think fit to pass."

"Vested rights" and "obligations of contracts," such as the organic laws protect, cannot co-exist with the right in one of the parties to use the property, and sell it, if needs be, to protect himself.

OCT 24 1884

114-663

Supreme Court of the United States.

CALVIN AMORY STEVENS ET ALS.

vs.

NASHVILLE AND CHATTANOOGA RAILROAD CO., NASHVILLE AND NORTHWESTERN RAILROAD CO., McMINNVILLE AND MANCHESTER RAILROAD CO., AND WINCHESTER AND ALABAMA RAILROAD CO.

Supplementary Brief of Edward H. East, relative to the Foreclosed Roads.

JUDD & DETWEILER, PRINTERS, Washington, D. C.

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The State had loaned the railroad companies, before the war, her bonds to the amount of about ten millions of dollars. The railroad property of the State, by reason of the fact that it furnished the best facilities for the contending armies, was liberally seized and used by each. At the conclusion of the war they had no rolling stock; their dirt embankments were washed; their trestles and bridges were decayed, and in some instances the iron rails had been taken off by the armies to be used on other roads and in other States. The following stipulation by counsel, as regards the condition of one of the roads, exemplifies the condition of all the roads which were proceeded against by the State. The road which was the subject of the particular stipulation is the Memphis, Clarksville and Louisville, and the stipulation is as follows:

"That company having defaulted on its interest, the Governor placed it in the hands of a receiver as early as July 1, 1865, and, though it was continued under receivers until it was sold, it never paid one cent into the treasury on any account whatever. The easterly span of the Cumberland river bridge and the whole bridge over the Tennessee river had been destroyed during the war; some of the trestling had been swept away—some of it thrown out of position—and all of it that was standing needed extensive repairs. The dirt embankments had been badly washed, and the cuts filled up with mud in some instances ten feet deep. Many parts of the road were overgrown with grass, weeds, and briars. The farmers along the road, being in need of iron during the war, had taken rods, bolts, spikes, and chains for blacksmithing purposes, and had even cut the bridges to get iron; switch circles, targets, and connecting rods were taken off and used for the same purpose."

When the first Legislature after the war assembled the great question presented for its consideration was, what should be done relative to railroads? If nothing was done the State was inevitably to lose her large investments in them without hope of reimbursement, and the lien owner, whether the State or the bondholder, was in no better condition.

The Legislature, whether wisely or foolishly, resolved to sustain the road, and continued to issue bonds to them in larger amounts than ever before. Some of the roads went back into the hands of the stockholders—others into the hands of receivers appointed by the Governors. Others were leased by authority of the Legislature. The result was that some of the roads, better located than others, succeeded, while others failed. All the agencies prescribed in the statutes were applied. Receivers were no more successful than the stockholders, and neither could pay current expenses. In the meantime the State was paying the interest on her

bonds, or she was funding the interest into other bonds and charging the amounts to the respective railroad companies.

This condition of affairs continued until 1869, when the whole matter was referred by the Legislature to a committee. This committee reported that if the relation of these roads to the State was not dissolved the State would be compelled to pay the semi-annual interest accruing on the bonds—also to pay the bonds on maturity—and in the meantime to run and keep up the roads at her own expense, which would make her debt, in the language of the committee, "amount to two-thirds of all the taxable property of the State." This was the condition of affairs which preceded and induced these acts of the Legislature and brought about the proceedings by which the roads were sold.

In this discussion the following are essential to the validity of the decree:

1. The court hearing the cause should have jurisdiction of the subject-matter.

2. Jurisdiction of the parties, either by actual service of process or by some sufficient substituted service prescribed by the State.

3. The decree or judgment of the court should be such as it was in the power of the court to pronounce.

JURISDICTION OF THE SUBJECT-MATTER.

What was the subject-matter of the litigation in the chancery court at Nashville? It was to compel the railroad companies, which had received the bonds of the State, to comply with the terms and conditions, prescribed in the statutes, under which they had received the bonds, as respects the payment of the interest and the sinking fund, and in doing this, to affect the property of the company, upon which the bondholders claim to have a lien. Under this view, the

respective—defaulted—companies were necessary parties, and as the bondholders claim an interest in this property by virtue an alleged lien upon it, they were proper parties.

On the question of the jurisdiction of the chancery courts in Tennessee over the subject-matter of this character of litigation, we submit to the consideration of the court the following statutes of the State of Tennessee.

First. The code of Tennessee, which went into effect May 1st, 1858, contains the following pertinent section:

4296. "Courts of chancery have power to hear and determine all controversies between the State, and incorporated companies, their stockholders or *creditors* growing out of the internal improvement laws of the State upon bill filed by the attorney general in behalf of the State." This was a controversy springing out of the internal improvement laws, and was a controversy between the State and the companies and their creditors.

Second. The sixth section of the act passed February 21st, 1856:

"That should any of the said railroad companies fail or refuse to comply with the provision of the fifth section of this act, it shall be the duty of the Governor forthwith to notify the attorney general of the district in which is situated the place of business of said company, failing or refusing, as aforesaid, of the fact, and thereupon the attorney general shall immediately proceed against (said) company, to collect said sinking fund in the manner prescribed in the sixth section of an act entitled 'An act to establish a system of internal improvement in this State;' passed February 11th, 1852."

The provision of the fifth section referred to, applied to all railroad companies "who have received, or may hereafter receive bonds of the State" to "annually set apart and pay over to the treasurer of the State two per centum upon all

bonds which have been or may hereafter be issued, etc., as a sinking fund for the ultimate redemption of the bonds issued, which sinking fund, when paid over, the Governor, comptroller of the treasury, the president of the bank of Tennessee, shall invest in bonds of the State, and reinvest all accruing interest in like securities, etc. etc."

The sixth section referred to, as prescribing the manner in which the defaulting railroad shall be dealt with, is the 6th section of the act of Feb. 11th, 1852, relative to the failure of the company to pay the bonds at maturity, and directs that the "Attorney General shall forthwith file a bill against said company, in the name of the State of Tennessee, in the chancery or circuit court of the county in which is situated said place of business, setting forth the facts, and thereupon said court shall make all such orders and decrees in said cause as may be deemed necessary by the court to receive (secure) the payment of said bonds, with the interest thereon, and to *indemnify the State of Tennessee against loss on account of the issuance of said bonds* by ordering the said railroad to be placed in the hands of a receiver, *ordering the sale of said road, and all property and assets attached thereto or belonging to said company, or in such manner as the court may deem best for the interest of the State.*"

3. The following section, taken from the act passed Dec. 7th, 1867, while not so pertinent as the two already quoted, could not well be omitted from this line of discussion:

SEC. 15. "That if the several railroad companies, or either of them, to whom the bonds of the State have been loaned by this act or former acts, shall fail for two consecutive years to pay the interest that may accrue upon the bonds loaned to them severally, then, and in that case, the Governor, secretary of State, and comptroller may, at their discretion, sell said railroad track, railing, rolling stock, &c., upon such terms and conditions as they may deem best to secure the interest of the State, and shall *retain* of the proceeds of said

sale the amounts loaned to said companies and the interest due on the same, with the expenses of said sales."

We submit with great confidence that the foregoing acts of the Legislature of Tennessee did confer upon the chancery courts full jurisdiction over the subject-matter brought before the court at Nashville.

To the foregoing, taken from the statute of the State, we superadd the following: That the chancery courts have generally maintained the jurisdiction to decree a sale of the whole or a part of the mortgaged property where the mortgage has a number of years to run, if the mortgagor has defaulted in the payment of an instalment of the interest or principal. If the property can be divided without serious detriment to its value, it will sell a sufficiency to meet the defaulted amounts, if it cannot be divided it will sell the whole.

Jones on Railroad Mortgages, 625.
Wilmer *vs.* Atlanta and Richmond Air Line, 447.
2 Jones on Mortgages, §§ 1616–1619.
Bank *vs.* Chester, 1 P. St., 282.

These railroad companies were in default largely, both for interest and instalments of principal, and, the bill alleged, were hopelessly insolvent, and this fact is conceded in the stipulation in some instances and is shown by the evidence in others.

Railroad property, for all beneficial purposes, is a unit. The track is valueless without the rolling stock and the latter is valueless without the track. It would have been reckless to have sold it out by piecemeal or parcels. It was manifestly the interest of all parties to sell it as a whole.

Jones on Railroad Securities, 625.

JURISDICTION OF THE PERSONS.

It is conceded that each railroad company was duly served with process and copy of bill, and was properly in court, and, beside, submitted to the jurisdiction and decrees, and consented to many of the decrees. It is quite apparent that these companies had no meritorious defence. Each had received the bonds which the bill charged it to have received; each had totally failed to pay one cent of either interest or sinking fund, and neither had a hope or a prospect of ever doing so. The terms, conditions, and penalties of the statutes under which they had received the bonds were plain and obvious, so far at least as they were concerned. It is error to suppose that their submission to the decrees of the court or the mandates of the Legislature was but playing a part in "a tragedy to assassinate the rights of the bondholders." They had no defence; their case was hopeless and helpless. Every allegation of fact in the bill was true as regards them. They had received bonds of the State under the act of February 21, 1856, well knowing that a sale of their property was the statutory and contractual penalty for a failure to pay the annual instalments to the sinking fund. They had taken bonds of the State under the act of December 7, 1867, well knowing that under the 15th section of that act that a failure for two years to pay the instalments to the sinking fund made every vestige of their property liable to be sold, at the discretion of the State.

It is said that the bondholders were not parties to said proceedings, and it is conceded that they were not executed with process, with the exception of Mr. Weaver. If they were before the court, they were brought in, alone, by virtue of the publication. The Tennessee Code contains the following sections:

4352. "Personal service of process on the defendant in the court of chancery is dispensed with in the following cases:"

Sub-section 4. "When the name of the defendant is unknown, and cannot be ascertained upon diligent inquiry."

Sub-sec. 5. "When the residence of the defendant is unknown and cannot be ascertained upon diligent inquiry."

4353. "To dispense with process in either of the above cases the facts shall be stated under oath in the bill, or by separate affidavit, as appears by the return."

4354. "In such cases, if the defendant does not cause his appearance to be entered, the clerk, as soon as the necessary affidavit is made, shall enter upon the rule docket an order requiring the defendant to appear at a certain day therein named, being a rule day, and defend, or otherwise the bill will be taken as confessed."

4355. "The clerk shall forthwith cause a copy of this order to be published for four consecutive weeks in the newspaper mentioned, in such order as designated by the general rules of the court."

4357. "The order of publication should contain the names of the parties, the style of the court in which the proceedings are had, and the name of the place where the court is held, without any brief or abstracts of facts, unless directed by the court."

4358. "When the suit is against an unknown defendant the order of publication should describe such unknown party, as near as may be, by the character in which he is sued, and by reference to his title or interest in the subject-matter of the litigation."

The bill, after naming specifically the railroad companies proceeded against, then specifies the following: "The holders of bonds issued by the State to these companies."

It alleges, after naming the railroad companies, defendants, that the names and residences of the various stockholders "are all unknown, as also the names and residences of a number of the holders of the bonds issued by the complainant, the State of Tennessee, to the before-named railroad companies."

The amended bill, filed April 15th, 1871, makes the several classes of defendants named in the original bill parties, then proceeds to state that their "names and residences are unknown and cannot be ascertained after diligent inquiry."

The bill was duly sworn to by the State's agent and attorney, W. B. Reese. There were many millions of these bonds outstanding and had been passing from hand to hand in the money markets of the world for many years; and it is quite apparent that it would be impossible, upon inquiry, to ascertain the names and residences of the holders.

It is complained that the order of publication does not "give any description of the unknown holders." We reply, that nothing could have been added; personally, they were unknown. All that was known was that some persons, somewhere in Europe or America, held the bonds which the State had issued to these railroad companies. The *character* in which those parties were sued was as "bondholders." Their title or interest in the subject-matter of the litigation was derived from the bonds held.

There is no case in Tennessee construing these sections of the code, save the one cited by appellees, of Ferress *vs.* Lewis, 2 Tenn. Chancery Reports, 291, decided by Chancellor Cooper, the State's solicitor in these cases, in the chancery court at Nashville, and who prepared the pleadings. The publication in that case failed, because the affidavit did not state that "diligent inquiry" had been made for either the names or residences of the unknown defendants; and also because "the order of publication did not describe them by the character in which they were sued." They had been sued "as devisees in remainder of certain lands, under the

will of Doolin," and publication was made for them as the "unknown heirs of Doolin."

The printed brief of appellants, while it maintains that the publication does not refer to the title or interest of the bondholders in the subject-matter of litigation, makes no suggestion of what it should have alleged.

Proceeds of sales to be paid in bonds by the purchaser of the roads.

It is claimed that as the act of the Legislature permitted the purchasers to pay the amounts of their bids, respectively, "in the outstanding legal bonds of the State," and the decree of the court repeated this permission, and the sales, except sale of M. C. & L. R. R., were so conducted, deprives the proceedings of all *judicial* character, and simply reduced the tribunal to the position of an executor of the *legislative* mandate.

We deem it sufficient answer to this to say that every act of the Legislature, commencing with the act of Feb. 11, 1852, relative to sinking fund payments commanded its investment in the bonds of the State.

The 7th section of that act required each company to "set apart one per centum per annum upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the company shall *pay* into the treasury of the State," &c.

The 5th section of the act of Feb. 21st, 1856, increased the sinking fund to two per cent. per annum, which was to be paid to the treasurer of the State, and "when paid over the Governor, comptroller of treasury, * * * shall invest in bonds of the State, and reinvest all accruing interest in like securities."

The 15th section of the act of Dec. 7th, 1867, (already quoted,) provided, in the case of the failure of the company to pay the interest for two consecutive years, "the Governor,

secretary of State, and comptroller *may, at their discretion*, sell said railroad track, railing, rolling stock, &c., and shall retain of the proceeds of said sale the amounts loaned to said companies and the interest due on the same," &c.

The act of March 20, 1860, increased the sinking fund to two and one-half per cent. per annum on the amount of bonds issued, and allowed it to be paid either in "cash," (section 5,) or "in the like character" of bonds, and by the 7th section it directed that if it was paid in cash it was made the duty of the commissioners to "invest it immediately in the bonds of the State."

We repeat, every dollar of the sinking fund payments, under the scheme of the statute, was to be ultimately invested in the bonds of the State. So, when the court permitted the purchasers to pay the amounts of their bids respectively in the bonds of the State, it was merely carrying out the scheme of all the Legislative acts upon which the original contract was based. It was doing directly what had to be done ultimately by the State through its officers and agents. This was entirely consistent with the original intent of the parties. The railroad companies had borrowed of the State the bonds of the State, and had contracted, in consideration for this loan, to return to the State an amount of bonds equal to the amount received by it

Again. The foreclosures took place many years before the maturity of the bonds in the hands of the holders. Had the proceeds of the sale of the roads been paid in cash it would necessarily have to be invested, to await the maturity of the bonds, more than twenty years. Hence, supposing the state to be a trustee, either for herself or the bondholders, we have a case in which the trustee has in her hands money. The trustee is a State, and by the scheme of the statute under which she holds it she has obligated herself to keep it invested in State bonds. She must make the investment, or pay it into her treasury as money.

We concede that there are cases in which the court may

have jurisdiction of the subject-matter and of the parties, and yet render a judgment or decree void either, in whole or in part.

Ex parte Lange, 18 Wall., 193.
Bigelow *vs.* Forrest, 9 Wall., 351.
Windsor *vs.* McVeigh, 93 U. S., 274.

Having acquired jurisdiction, the court must proceed "according to the established modes governing the class to which the case belongs and does not transcend in the extent or character of its judgment the law which is applicable to it." It must "keep within the power of its jurisdiction."

20 Wall., 250.

The failure of the court to direct the State to hold the bonds as trustee for the benefit of the bondholders, even if it had been proper, would not render the decree void.

It is said, in the third objection of complainants, that the bill did not seek or pray a compulsory sale: "that it merely sought a consent sale." In reply, we submit the following quotation from the bill:

"The failure of these companies to comply with any one of the conditions upon which State aid was extended to them makes a forfeiture of all their rights under the internal improvement laws, and authorizes your orator (the State) to demand a *sale* of all the property and effects, rights, privileges, and franchises of said several companies; the proceeds of sale to be applied, first, to the extinguishment of the debt due your orator, with interest and costs, and the surplus, if any, to the satisfaction of other debts in the order of their liens." (See page 2591.)

One of the prayers of the bill is:

"Your orator also prays your honor to decree a sale of said roads, with all their property, franchises, and rights, if necessary and proper, upon final hearing, as manifestly for the interest of all parties, and expressly or tacitly assented to by

such parties, such sale to be made by the commission appointed by the Legislature, the proceeds of sale to be paid to the parties entitled." (See page 2593.)

The fourth objection of complainants is, that the decree having held that the State was the sole owner of the lien, "and that the holders of said bonds have no right *now, and will have none at the maturity of said bonds,*" to the lien, and was but an attempt to declare future rights, except as to the coupons already matured. We reply to this—

1. The scheme of the statute gave the State the right to sell the property for defaulted instalments, as did also the general law, (as shown hereinbefore,) and the exercise of this right passed the property unencumbered to the purchaser.

2. Adjudication relative to coupons past due, as to whether the bonds for which they are taken have liens to secure their payment, is conclusive on all coupons falling due in future as well as upon the bonds themselves.

Edward H East

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